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No. 84—

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IN THE

Supreme Court of the United States

October Term, 1984

BUFFALO BROADCASTING COMPANY, INC., KID BROADCASTING CORPORATION, KWTX BROADCASTING COMPANY, INC., METROMEDIA, INC. and STORER BROADCASTING COMPANY, On Behalf Of Themselves and All Persons or Entities Who Own Local Television Stations Which Obtain Music Performance Rights Pursuant to Music License Agreements With American Society of Composers, Authors and Publishers and/or Broadcast Music, Inc.,

Petitioners,

— against —

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, STANLEY ADAMS, as President of American Society of Composers, Authors and Publishers, CY COLEMAN, HAL DAVID, FAMOUS MUSIC CORP., MCA, INC., MORTON GOULD, SHAPIRO, BERNSTEIN & CO., INC., On Behalf of Themselves And All Other Members of American Society of Composers, Authors and Publishers, BROADCAST MUSIC, INC., AL GALLICO MUSIC CORP., PAUL ANKA, JERRY BOCK, SHELDON HARNICK, HOLLIS MUSIC, INC., and UNART MUSIC CORP., On Behalf of Themselves And All Other Affiliates Of Broadcast Music, Inc.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

IRA M. MILLSTEIN
767 Fifth Avenue
New York, New York 10153
(212) 310-8000
Counsel of Record

Of Counsel:

JAMES W. QUINN
R. BRUCE RICH
KENNETH L. STEINTHAL
LOIS PEEL EISENSTEIN
MARTIN J. SILVERMAN

WEIL, GOTSHAL & MANGES

169pp

Questions Presented

Petitioners, as representatives of a class of substantially all of the nation's local commercial television stations, brought this suit against respondents American Society of Composers, Authors and Publishers ("ASCAP") and Broadcast Music, Inc. ("BMI") under Section 1 of the Sherman Act, alleging that respondents' use of a blanket license for their copyrighted musical compositions constitutes an unreasonable restraint of trade in its application to the commerce of this particular class of users. The class sought to enjoin the use of this particular application of the blanket license and thus to bring some competition to the licensing of music performing rights.

Following a month-long trial, the District Court found that the blanket license in this market setting "prevents price competition between and among the pooled compositions," forces local television stations "to purchase access to the entire repertories of ASCAP and BMI although the station's needs could certainly be satisfied by a far more limited selection," and forecloses the development of alternative market arrangements which "would permit price competition among musical compositions." Petitioners' Appendix B ("Pet. App. B") at 79a, 80a-81a, 85a. Based on a careful weighing of the proven anti-competitive effects of the license and its "insignificant" pro-competitive benefits in the relevant market, *id.* at 85a, the District Court held that the blanket license violates the rule of reason as delineated by this Court in *Broadcast Music, Inc.* v. *Columbia Broadcasting System, Inc.*, 441 U.S. 1 (1979) ("*CBS*").

The Court of Appeals reversed and dismissed the complaint, holding "as a matter of law" that petitioners had

not proven any "restraint at all" under the Sherman Act, because it was possible to envision hypothetical alternatives which petitioners might have used to avoid the blanket license. Pet. App. A at 4a, 17a. The Court of Appeals did not proceed beyond finding no restraint. It did not attempt to weigh the pro- versus anti-competitive effects of the blanket license. By so truncating the inquiry, the Court of Appeals failed to consider the economic impact of the blanket license as required by past decisions construing the rule of reason, and by this Court's express holding in *CBS*.

The questions presented are as follows:

1. Did the Court of Appeals err in refusing to balance the pro- and anti-competitive consequences of a blanket license which concededly eliminates price competition among music copyright holders, which this Court previously recognized "involves 'price fixing' in the literal sense" and involves "concerted action in a large and active line of commerce," and which this Court expressly held should be subjected to a "discriminating examination under the rule of reason" (*CBS*, 441 U.S. at 8, 10, 24)?

2. Did the Court of Appeals err in holding that a blanket license that eliminates rivalry among music copyright holders does not restrain trade "at all" under the Sherman Act simply because users of the license have hypothetical means to avoid its burdens?

Parties to the Proceeding

The five petitioners, Buffalo Broadcasting Company, Inc., KID Broadcasting Corporation, KWTX Broadcasting Company, Inc., Metromedia, Inc. and Storer Broadcasting Company, represent a class of all owners of local television stations in the United States who obtain music performing rights pursuant to licensing agreements with ASCAP and BMI.*

Respondents are ASCAP, BMI and eleven individual respondents representing two certified classes consisting of, respectively, all persons from whom ASCAP, and all persons from whom BMI, have obtained the rights to license music performing rights.

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* Pursuant to Rule 28.1 of the Rules of the Supreme Court, the following information identifies the parent companies, non-wholly owned subsidiaries and affiliates of the petitioners. Buffalo Broadcasting Company, Inc.: Howard Publications, Inc. KID Broadcasting Corporation (to be acquired Dec. 17, 1984 by Idaho Falls Broadcasting Co.): Upper Valley Telecable Co., Inc. KWTX Broadcasting Company, Inc.: Brazos Broadcasting Co.; Victoria Broadcasters, Inc. Storer Broadcasting Company (name changed to Storer Communications, Inc.): ADR/CADRE, Inc.; Catoctin Cable Communications, Inc.; Gateway Communications, Inc.; Houston Community Cablevision, Inc.; Howard Cable Television Associates, Inc.; Minority Broadcast Investment Corp.; Riverside Cable TV, Inc.; Storer Cable Communications of Arkansas, Inc.; Storer Communications of Bowling Green-Warren County, Inc.; Storer Communications of Jefferson County, Inc.; Storer Cable Communications of Maryland, Inc.; Storer Riverfront Cable Communications, Inc.

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No. 84—

IN THE

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October Term, 1984

BUFFALO BROADCASTING COMPANY, INC., KID BROADCASTING CORPORATION, KWTX BROADCASTING COMPANY, INC., METROMEDIA, INC. and STORER BROADCASTING COMPANY, On Behalf Of Themselves and All Persons or Entities Who Own Local Television Stations Which Obtain Music Performance Rights Pursuant to Music License Agreements With American Society of Composers, Authors and Publishers and/or Broadcast Music, Inc.,

Petitioners,

— against —

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, STANLEY ADAMS, as President of American Society of Composers, Authors and Publishers, CY COLEMAN, HAL DAVID, FAMOUS MUSIC CORP., MCA, INC., MORTON GOULD, SHAPIRO, BERNSTEIN & CO., INC., On Behalf of Themselves And All Other Members of American Society of Composers, Authors and Publishers, BROADCAST MUSIC, INC., AL GALLICO MUSIC CORP., PAUL ANKA, JERRY BOCK, SHELDON HARNICK, HOLLIS MUSIC, INC., and UNART MUSIC CORP., On Behalf of Themselves And All Other Affiliates Of Broadcast Music, Inc.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners respectfully request that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Second Circuit, entered on September 18, 1984, which reversed the judgment of the United States District Court for the Southern District of New York, entered on January 4, 1983.

Opinions Below

The opinion of the Court of Appeals is reported at 744 F.2d 917 and is set forth at Appendix A hereto ("2d Cir. Op.," Pet. App. A at 1a-39a). The opinion of the District Court is reported at 546 F. Supp. 274 and is set forth at Appendix B hereto ("D. Ct. Op.," Pet. App. B at 40a- 86a).

Jurisdiction

The judgment of the Court of Appeals was entered on September 18, 1984 (Pet. App. D at 100a). The order of the Court of Appeals denying petitioners' request for a rehearing and suggestion for a rehearing in banc was entered on November 1, 1984 (Pet. App. E at 102a). This Court has jurisdiction to review the judgment of the Court of Appeals by writ of certiorari pursuant to 28 U.S.C. § 1254(1). Jurisdiction in the District Court was based on 15 U.S.C. §§ 15, 26; 28 U.S.C. §§ 1337, 1338(a); and 28 U.S.C. §§ 2201, 2202.

Statute Involved

This case involves Section 1 of the Sherman Act, 15 U.S.C. § 1, which provides in relevant part:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.

STATEMENT OF THE CASE

1. *Petitioners.* The five petitioners, as owners of local television stations, represent a class of all owners of local television stations in the United States who obtain music performing rights pursuant to copyright licensing agreements with ASCAP and BMI. The class comprises approximately 450 owners of some 750 television stations, and includes both network-affiliated and independent stations.

The local television station blanket licenses challenged herein cover performances of music on the stations' non-network program day. The vast preponderance of music so licensed is of the theme and background variety, and is found in the stations' pre-recorded, syndicated programs, such as *I Love Lucy* and *The Rockford Files.* Such programs are licensed by the stations from producers or syndicators and arrive "in the can," on film or videotape, typically having been produced years earlier. With the exception of music performing rights, which are licensed to the stations through ASCAP and BMI, all copyright performing and other rights necessary for the broadcast of such programs have already been obtained by the producer at the time of production, *i.e.*, "at the source." The omission of music performing rights occurs even though the producer is responsible for the selection of the music, and already engages in direct negotiations with the copyright owners with respect to other rights in the same music, including synchronization (*i.e.*, recording) rights and, where relevant, performing rights for motion picture theatre exhibition. D. Ct. Opp., Pet. App. B at 56a-59a.

2. *Respondents.* ASCAP is an unincorporated association and BMI a non-profit corporation both of which license the music performing rights of their writer and publisher members and affiliates to a wide variety of users, including local television stations. As of the time of trial, ASCAP represented some 29,000 writers and music publishers, and had more than three million musical compositions in its licensing repertory, while BMI represented some 60,000 writers and publishers, and had more than one million compositions in its repertory. *Id.* at 43a-44a.

ASCAP and BMI together license virtually all of the copyrighted music in the United States. The blanket licenses they offer local television stations provide access to all of the compositions in their repertories; they make no other forms of license available. Under the terms of such licenses, a local television station controls neither the number nor quality of the compositions it purchases and cannot reduce its costs by reducing its use of music. The blanket license price is based upon a percentage of the stations' advertising revenues, a measure that reflects the stations' varying ability to pay, but bears no relationship to the cost, quantity or quality of the music or its value to a given station.[1] *Id.* at 54a-55a.

The eleven individual respondents represent two certified classes consisting of, respectively, all persons from whom ASCAP, and all persons from whom BMI, have obtained the rights to license music performing rights. *Id.* at 44a.

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1. ASCAP and BMI do offer a so-called "per program" form of license, which the decisions below recognized to constitute but another form of all-or-nothing, revenue-based blanket license. 2d Cir. Op., Pet. App. A at 23a-24a; D. Ct. Op., Pet. App. B at 69a.

The *CBS* Case Background

In *Broadcast Music, Inc.* v. *Columbia Broadcasting System, Inc.*, 441 U.S. 1 (1979) ("*CBS*"), this Court, in the context of a television network's challenge to ASCAP's and BMI's blanket licensing practices, established the legal framework for evaluating the blanket license. The *CBS* case came to this Court for review from a ruling by the Court of Appeals for the Second Circuit, per Judge Gurfein, that ASCAP's and BMI's blanket licenses constituted *per se* illegal price-fixing arrangements. *Columbia Broadcasting System, Inc.* v. *American Society of Composers, Authors and Publishers*, 562 F.2d 130 (2d Cir. 1977). This Court reversed, noting that, although "the blanket-license fee is not set by competition among individual copyright owners," 441 U.S. at 23, and while "the copyright laws confer no rights on copyright owners to fix prices among themselves or otherwise to violate the antitrust laws," *id.* at 19, such licensing form should not be condemned as *per se* illegal, since it is not so blatantly anti-competitive in all of its "manifestations" as to warrant a declaration of automatic illegality. *Id.* at 24.

Specifically, this Court found that since the blanket license "allows the licensee immediate use of covered compositions, without the delay of prior individual negotiations," *id.* at 22, there were some circumstances where, absent the blanket license, "the commerce anticipated by the Copyright Act and protected against restraint by the Sherman Act would not exist at all. . . ." *Id.* at 19. This Court made clear its reference here to the "milieu" of "individual radio stations, nightclubs, and restaurants," *id.* at 20, where the blanket license originated, and where

" '[t]he disk-jockey's itchy fingers and the bandleader's restive baton' " precluded as a practical matter the negotiation of music rights "well in advance of the time of performance." *Id.* at 22 n.37. The Court at the same time contrasted those instances from the situations in which music rights could be individually and directly negotiated in advance—"dramatic rights . . . [and] other rights, such as sheet music, recording, and synchronization"—where there would be little, if any, justification for a blanket license. *Id.*

The Court concluded from such analysis that, "when attacked, [the blanket license] should be subjected to a more discriminating examination under the rule of reason. It may not ultimately survive that attack, but that is not the issue before us today." *Id.* at 24.[2]

The Court of Appeals for the Second Circuit, on remand for consideration of the television network claim under the rule of reason, solicited the views of the Department of Justice. The resulting Government brief ("U.S. 1979 Br.") noted that the rule of reason analysis prescribed by this Court requires a careful assessment of the competitive effects of the conduct in question. *Id.*, Pet. App. G at 109a-110a. Citing "the undisputed fact that the [network tele-

2. While the majority preferred to remand the case for an in-depth rule of reason analysis, Justice Stevens found application of the rule of reason so straightforward that he would have applied it without a remand. He accordingly dissented from the remand order, observing: "[T]he record describes a market that could be competitive and is not, and since that market is dominated by two firms engaged in a single blanket method of dealing, it surely seems logical to conclude that trade has been restrained unreasonably." 441 U.S. at 34. Although the majority preferred to order further proceedings on remand, it did not disagree with Justice Stevens' assessment of the lack of competitive conditions in the relevant market.

vision] market reflects substantial deviations from the competitive norm,"[3] the Government concluded that the burden properly should be placed on ASCAP and BMI to demonstrate "that procompetitive benefits attributable to use of a blanket license for the networks outweigh the anticompetitive effects and that the blanket license is no more restrictive than necessary to achieve the countervailing benefits." *Id.* at 117a.[4]

In its decision on remand, the Second Circuit, per Judge Newman, acknowledged that a rule of reason analysis ordinarily "requires a determination of whether an agreement is on balance an unreasonable restraint of trade, that

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3. Among the factors cited by the Government in support of this recognition were the complete absence of price competition among ASCAP's and BMI's thousands of composers and publishers and the persistent price discrimination reflected in ASCAP's and BMI's method of charging fees as a percentage of a user's advertising revenues. U.S. 1979 Br., Pet. App. G at 113a-115a.

4. The Government sharply contrasted the appropriate rule of reason analysis with the legal analysis which had been conducted by the trial court in its dismissal of the complaint in *CBS. Columbia Broadcasting System, Inc.* v. *American Society of Composers, Authors and Publishers,* 400 F. Supp. 737 (S.D.N.Y. 1975). CBS had challenged the legality of the blanket license at trial principally on the ground that the license imposed an unlawful tie-in by requiring CBS to purchase performing rights to unwanted music in order to secure rights to perform desired music. *Id.* at 745. The District Court, proceeding on such tying theory, required CBS, as a threshold matter, to prove that ASCAP and BMI had compelled CBS to take the blanket license. *Id.* at 747-51. Finding that CBS had failed to prove it could not obtain licenses directly from copyright owners, the District Court dismissed the complaint. *Id.* at 780-81. The Government criticized this narrow focus:

> Believing that as long as a feasible alternative to blanket licensing existed CBS had failed to prove an unlawful restraint, the district court did not attempt to ascertain whether the blanket license contributed to less blatant deviations from a competitive market. Finding no likelihood of an outright refusal to deal, the district court felt no need to conduct a balancing test or consider less restrictive alternatives. (U.S. 1979 Br., Pet. App. G at 112a-113a).

is, whether its anti-competitive effects outweigh its pro-competitive effects." *Columbia Broadcasting System, Inc.*, v. *American Society of Composers, Authors and Publishers*, 620 F.2d 930, 934 (2d Cir. 1980) ("*CBS Remand*"). The court nevertheless concluded that such weighing of the pro- and anti-competitive effects of the license might be avoided altogether if it were determined that "the [network] blanket license has no anti-competitive effect at all," *i.e.*, that it is not in the first instance a "restraint at all" requiring an evaluation of its reasonableness. *Id.* at 934-35. Interpreting this Court's decision in *CBS* as not having foreclosed this "threshold" consideration, the court proceeded to rule that since the trial record demonstrated that CBS likely had "fully available" alternatives to the blanket license of which it had failed to take advantage, the blanket license could not be said, in the circumstances, to restrain competition in Sherman Act terms. *Id.* at 935-39. In language that would soon profoundly influence the petitioning stations' own case, the Court of Appeals held, *id.* at 935:

> [A] practice that is not a *per se* violation, and this blanket license has authoritatively been found not to be such, does not restrain trade *when the complaining customer elects to use it in preference to realistically available marketing alternatives.* [Emphasis added].

The Court of Appeals thereupon concluded—in disregard of the Justice Department's *amicus* brief, of this Court's 70-year recognition that "[e]very agreement concerning trade . . . restrains," *Chicago Board of Trade* v. *United States*, 246 U.S. 231, 238 (1918), and of this Court's specific direction to subject the blanket license to "discriminating examination" under the rule of reason, *CBS*, 441

U.S. at 24—that "the balancing of pro- and anti-competitive effects [of the blanket license] need not be undertaken," and that the trial court's dismissal of CBS's complaint should be reinstated. 620 F.2d at 934.

Upon CBS's petition for certiorari seeking further review by this Court, the Solicitor General, asked by this Court for his views, reiterated the Government's sharp disagreement with the truncated analysis first conducted by the *CBS* trial court and subsequently embraced by the Court of Appeals on remand. As the Government brief ("U.S. 1981 Br.") noted: "[I]t does not necessarily follow that the existence of economic alternatives demonstrates that respondents' licensing scheme has no anticompetitive effect." *Id.*, Pet. App. H at 128a. In unequivocal language, the Solicitor General cautioned that, "if the court of appeals intended to establish a rule of general applicability on this point, *its decision would be clearly wrong and appropriately subject to summary reversal.*" *Id.* at 131a n.13 (emphasis added). Pointing out, however, that the improperly "narrow focus" of the appeals court's decision was attributable to CBS's own trial strategy—*i.e.*, its pursuit of a tie-in theory requiring proof of compulsion—and emphasizing the unusual "factual setting of this *'sui generis'* case," *id.*, the Solicitor General recommended against certiorari. *Id.* at 132a.[5]

This Court thereafter denied CBS's petition for certiorari. 450 U.S. 970 (1981).

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5. ASCAP and BMI similarly minimized the significance of *CBS Remand*. ASCAP, for example, advised this Court that the decision involved simply CBS's failure "to prove the facts supporting the allegations of illegal conduct made in its complaint." ASCAP Brief in Opposition to Petition for Writ of Certiorari, *CBS* v. *ASCAP*, 450 U.S. 970 (1981) ("Opp. Br.") at 7. *See also* BMI Opp. Br. at 13.

The Proceedings Below

Each individual local television station class member, found by the trial court below to be as different from the huge television networks as night is from day,[6] presented through the class a legal claim at trial which was totally distinct from CBS's tie-in theory. The stations' claim was that the blanket license, in its application to the stations' non-network program day, serves to blockade the development and functioning of a competitive market for the licensing of music performing rights. The unrefuted record evidence demonstrated that the "vastly predominant portion" of music in the non-network program day is found in the stations' pre-recorded, syndicated programming, and that most such music is "usually interchangeable" theme and background. D. Ct. Op., Pet. App. B at 52a. All parties recognized that a competitive licensing alternative is feasible in this market so heavily characterized by pre-planned music uses, and that such alternative (unlike the present state of the market) would foster price competition. *Id.* at 85a.

Specifically, the most likely competitive alternative was acknowledged to be producer "source licensing," whereby the program producer would obtain music performing rights in face-to-face negotiations with the very same composers and music publishers with whom it already deals in

6. The District Court recognized that, for a variety of factually found reasons, "CBS is not [WIVB] in Buffalo" (Gagliardi, J., Trial Transcript, Nov. 16, 1981, at 49) since, *inter alia,* individual stations possess neither the unique exhibition power nor the strategic position in the production of programs enjoyed by the networks—the "only three games in town." *CBS* v. *ASCAP,* 400 F. Supp. at 768. *See* D. Ct. Op., Pet. App. B at 70a n.36, 72a-74a.

acquiring synchronization (*i.e.*, recording) rights for prerecorded programs. The stations demonstrated that it was economically anomalous that, uniquely among all programming elements (including all other copyright performing rights), music performing rights are not so licensed—at a point in time when meaningful price and quality competition can occur—but are instead licensed through ASCAP and BMI in a market characterized by the total absence of price competition.

Respondents' admissions on most of the key facts, coupled with substantial additional and largely unrefuted trial proof, led the District Court to find without difficulty:

> —that ASCAP's and BMI's blanket licensing practices in this market "[insulate] composers from . . . price competition" among themselves with respect to the licensing of performing rights (D. Ct. Op., Pet. App. B at 58a);
>
> —that, "should the blanket license be enjoined, [producer] source licensing would probably evolve" (*id.* at 85a);
>
> —that, "in sharp contrast to the blanket license, licensing of television performing rights at the source would permit price competition among musical compositions" (*id.*); and
>
> —that, as "transaction and monitoring costs" considerations are "negligible" in this market setting, "source licensing would be more pro-competitive than the existing blanket license" (*id.* at 85a-86a).

These findings fit easily into the analytical framework of this Court's decision in *CBS*. Though eliminating competition, the blanket license cannot be considered ***per se***

unlawful in some market contexts—*e.g.*, in facilitating the random, spontaneous use of music by nightclubs, restaurants, the "disk-jockey's itchy fingers" or the "bandleader's restive baton"—where it performs a "market-making" function.[7] But where dealing with pre-recorded, syndicated programs, in which music is selected "well in advance of the time of performance,"[8] the blanket license serves no such function. In such a market context, it serves only to eliminate price competition and to prevent the emergence of the competitive, source licensing market which concededly would arise in its absence.

But the stations were not permitted by the Second Circuit's prior decision in *CBS Remand* to rest on their showing that, in this market, the blanket license is manifestly anti-competitive. For, notwithstanding the prior representations by ASCAP and BMI to this Court as to the limited applicability of the *CBS Remand* legal formulation to the *CBS* facts, respondents argued at the trial of this case and on appeal that the "threshold" inquiry in any rule of reason evaluation of ASCAP's and BMI's blanket licenses is whether the user has realistic marketing alternatives available to it.[9]

The local television stations, asserting all the while that such a legal obstacle to recovery was inappropriate, could not risk ignoring the law of their Circuit. They accordingly presented proof at trial to demonstrate that, even

7. *CBS*, 441 U.S. at 22 n.37, 23.

8. *Id.* at 22 n.37.

9. *See* respondents' briefs below: ASCAP Trial Brief ("Tr. Br.") at 12-13; BMI & BMI Affiliates Tr. Br. at 23-24; ASCAP Post-Tr. Br. at 5-6; BMI Post-Tr. Br. at 7.

under the Court of Appeals' unique and erroneous "restraint" analysis, the trade of individual local television stations in purchasing music performing rights had been restrained, since those individual stations lacked the realistic ability simply to drop their blanket licenses and fulfill their licensing needs through other means. The stations' trial proof on this score again was substantial and largely unrefuted. The District Court's finding that, from the point of view of the stations, the blanket license had not been "freely chosen among realistically available alternatives" (D. Ct. Op., Pet. App. B at 68a), differed dramatically from the factual conclusion of the trial court in *CBS*, as adopted by *CBS Remand*, 620 F.2d at 935—that CBS had "elected" to use the blanket license in preference to practical alternatives.[10]

In its decision below, the Second Circuit, again per Judge Newman, returned to its *CBS Remand* restraint formulation, notwithstanding the vastly different factual and legal posture of this case from *CBS*. Ignoring all of the trial court's findings as to the patently anti-competitive nature of the blanket license in this market setting and its lack of redeeming pro-competitive features, the Court of Appeals focused exclusively on the evidence concerning the availability to individual television stations of "realistic alternatives" to that license. Without holding a single fact finding below to be "clearly erroneous," the Court of Appeals concluded "as a matter of law" that the stations had

10. Thus, after conducting a four-week bench trial (which included testimony from seventeen witnesses, as augmented by voluminous documentary evidence and deposition testimony), the trial court weighed the evidence and found, *as a matter of fact*, that each of the blanket license "alternatives" hypothesized by the defendants as being available to individual television stations for the asking were not available or attainable as a practical matter. D. Ct. Op., Pet. App. B at 70a, 74a, 78a.

failed to prove that there were no alternatives which the stations could use to escape the blanket license, and hence that there was no restraint "at all." 2d Cir. Op., Pet. App. A at 4a, 17a. Having determined that the stations had failed to surmount this threshold "restraint" hurdle, the Court of Appeals declined to balance the pro- and anti-competitive effects of the license, and thus avoided for a second time what this Court has long determined is the traditional core of antitrust analysis.

REASONS FOR GRANTING THE PETITION

I.

THE SECOND CIRCUIT'S THRESHOLD "RESTRAINT" TEST CONTRAVENES THIS COURT'S LONG-ESTABLISHED MODE OF ANALYZING ANTITRUST CASES UNDER THE RULE OF REASON, WITH IMPORTANT POTENTIAL ADVERSE CONSEQUENCES FOR ANTITRUST ENFORCEMENT.

The Court of Appeals, in *CBS Remand* and in this case, has spent its entire energy in determining whether the blanket license is a restraint of trade. This Court has never made such an inquiry the central focus of a rule of reason analysis. The reason has been quite clear since at least 1911 and this Court's seminal decision in *Standard Oil Co.* v. *United States,* 221 U.S. 1 (1911). The Court there held that the language of the Sherman Act was quite deliberately made broad enough "to embrace any conceivable contract or combination which could be made concerning trade or commerce." *Id.* at 60. The scheme of the Sherman Act is to bring any such concerted activity done "in the

whole field of human activity" within its purview for consideration, and then to weigh if it "unreasonably" restrains trade. *Id.* Courts do not spend time semantically determining if there is a restraint, since "[e]very agreement concerning trade, every regulation of trade, restrains." *Chicago Board of Trade* v. *United States,* 246 U.S. 231, 238 (1918). They do spend time balancing pro- and anti-competitive effects to determine the reasonableness of the agreement, contract, or combination.[11]

This is precisely what this Court directed the Court of Appeals to do in *CBS,* namely, subject the questioned conduct to a searching and discriminating balancing test under the rule of reason. The Court of Appeals improperly avoided that direction by somehow labelling a contract and combination which is literal "price-fixing" in a large and active line of commerce, no "restraint at all."

Through its approach, the Court of Appeals has undone nearly a century of Sherman Act precedent, and will obliterate rule of reason balancing in many cases. It has imposed upon antitrust plaintiffs a threshold burden of proving that there were no practical alternatives which they could find, by affirmatively seeking them out, to avoid the restraint before it becomes a restraint "at all."

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11. This Court repeatedly has instructed that a proper rule of reason examination requires a court to weigh all of the competitive implications of a challenged practice to determine whether on balance the practice is one that promotes or suppresses competition. *Arizona* v. *Maricopa County Medical Society,* 457 U.S. 332, 343 (1982); *National Society of Professional Engineers* v. *United States,* 435 U.S. 679, 691 (1978); *Continental T.V., Inc.* v. *GTE Sylvania, Inc.,* 433 U.S. 36, 49 (1977); *Chicago Board of Trade* v. *United States,* 246 U.S. 231, 238 (1918) ("The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition"). *See also* L. Sullivan, *Antitrust* 187-88 (1977).

Under the Court of Appeals' approach, many of this Court's rule of reason—or indeed *per se*[12]—cases would have been decided differently. Thus, in *United States* v. *Container Corp.*, 393 U.S. 333 (1969), there was no "restraint" in the narrow sense here crafted by the Court of Appeals. The agreement to exchange price information restrained neither sellers nor buyers. Like the copyright owners here, the container sellers had complete "freedom to withdraw from the agreement," *id.* at 335, and buyers could protect themselves by dickering with sellers on a unilateral basis. Under the Second Circuit's rationale, the victims of the combination surely had realistic and practical alternatives; hence the Second Circuit would have held there to be no restraint at all. Yet, this Court recognized in *Container* that the agreement had the effect of chilling price flexibility—and therefore "restrained" competition within the meaning of the Sherman Act. This real world anti-competitive effect was sufficient to condemn the agreement.

Equally instructive is *National Society of Professional Engineers* v. *United States*, 435 U.S. 679 (1978). The defendants in that case pointed to the fact that price competition remained available among individual sellers, notwithstanding the association's ban on competitive bidding. But this Court nonetheless found a "restraint" and con-

12. The fallacy of the Court of Appeals' restraint standard is apparent from the fact that this standard would permit a variety of conduct that this Court has held *per se* illegal, simply because the challenged conduct did not foreclose all possible market alternatives. Such a result would, of course, be highly anomalous under this Court's precedents, since this Court has held *per se* unlawful only that conduct which is so perniciously anti-competitive, and so lacks any redeeming virtue, that judicial resources need not be wasted on a full-blown rule of reason trial. *Northern Pacific Railway Co.* v. *United States*, 356 U.S. 1 (1958).

demned the practice as tampering with a freely competitive market, thus rejecting the argument that because not all avenues of competition had been foreclosed by the arrangement, it could withstand Sherman Act scrutiny.

Likewise, in *Associated Press* v. *United States*, 326 U.S. 1 (1945), since newspaper publishers who were not members of AP freely could purchase news from other agencies, defendants contended that it was no violation of the Sherman Act for AP member publishers to combine to refuse to sell AP news to non-members. But this Court found a "restraint" and condemned AP's practice, recognizing that a challenged arrangement need not suppress *all* competition between the parties to violate the Act.

And, in *Arizona* v. *Maricopa County Medical Society*, 457 U.S. 332 (1982), the physicians set a maximum price for their services when offered through associations, but they preserved their right to charge less than the scheduled rates. Patients could protect themselves by bargaining for lower rates, and no one was "coerced" into accepting the maximum rates. Nevertheless, despite the existence of "alternatives" to protect buyers, this Court did not hesitate to find a "restraint" and brand the agreement as *per se* unlawful, in view of its tendency to inhibit the vigor of price competition.

Many other decisions of this Court would be turned topsy-turvy by the Court of Appeals' "restraint" ration-

ale.[13] These include cases where this Court has not hesitated to find an agreement unlawful even though the buyer had entered voluntarily into the arrangement and presumably could easily have avoided its anti-competitive effects. *See, e.g., Perma Life Mufflers, Inc.* v. *International Parts Corp.*, 392 U.S. 134 (1968); *Albrecht* v. *Herald Co.*, 390 U.S. 145 (1968); *Simpson* v. *Union Oil Co.*, 377 U.S. 13 (1964).

In sum, a requirement that the victims of an arrangement prove that they have no practical means of protecting themselves has never been a prerequisite to finding that an arrangement is a restraint under Section 1 of the Sherman Act. The courts have been directed to consider all contracts and combinations to be "restraints" and to focus, by balancing pro- and anti-competitive effects, upon the economic consequences of the restraint. The relevant question under the Sherman Act is not whether the burden of the challenged agreement among defendants can somehow be avoided by the victims, but whether the agreement unreasonably diminishes competition among the defendants themselves.

By focusing attention only on the theoretical possibility that some persons might be able to mitigate their injury by

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13. *See, e.g., Nationwide Trailer Rental System, Inc.* v. *United States*, 355 U.S. 10 (1957), *aff'g* 156 F. Supp. 800, 804 (D. Kan. 1957) (upholding the *per se* illegality of a trade organization's suggested rate schedule even though the rates were not strictly adhered to and no penalty ever was imposed for deviations); *United States* v. *National Association of Real Estate Boards*, 339 U.S. 485, 488-89 (1950) (non-mandatory rate schedules prescribed by trade association held *per se* unlawful); *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 224 & n.59 (1940) (oil companies' agreement to fix prices violated the Sherman Act even if no overt act ever was shown, the companies did not have the available means to accomplish their objective, and the agreement embraced only a part of the interstate commerce in the commodity).

affirmatively searching out alternatives to the restraint, the Court of Appeals has lost sight of the fact that the federal antitrust laws are concerned with economic reality—with the effect of agreements among competitors on economic markets. Where those actual consequences are adverse, it defeats Congress's purposes under the Sherman Act to dismiss an antitrust complaint simply because there is a speculative possibility of victim self-defense. The premise of the Sherman Act is that "unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality, and the greatest material progress." *Northern Pacific Railway Co.* v. *United States,* 356 U.S. 1, 4 (1958). Where an agreement among competitors with substantial market power raises prices, misallocates resources, and retards progress by eliminating rivalry among sellers, those effects may not be ignored: it is manifest that such an agreement restrains trade by suppressing the vigor of competition. And if it suppresses competition, it surely requires a careful rule of reason balancing of the actual effects found in the marketplace.

The Court of Appeals' departure from prior decisions of this Court devitalizes the rule of reason precisely at a time when the rule is assuming an ever more significant role in antitrust analysis.[14] An increasing array of competitive problems have been viewed by this Court as well as by the Justice Department as warranting rule of reason

14. *See, e.g.,* P. Areeda & D.F. Turner, *Antitrust Law* ¶ 105 (1978); Taylor, *Rule of Reason Cases Since National Society of Professional Engineers,* 51 Antitrust L.J. 185, 190, 192 (1982); Comment, *Applying the Rule of Reason: A Survey of Recent Cases and Comment,* 17 San Diego L. Rev. 335, 336 (1980).

scrutiny, rather than *per se* condemnation.[15] It is one thing for the courts to proceed with caution in condemning arrangements as *per se* illegal, in favor of a closer examination of their competitive effects. It is quite another for a court to eschew a competitive analysis altogether, on the ground that the complaining party theoretically might have avoided the harmful effects of the challenged practice. Adoption of the Second Circuit's "restraint" formulation would have the ironic consequence of effectively insulating practices at one time viewed as *per se* illegal from any meaningful antitrust scrutiny at all.

Because the Court of Appeals now has made clear that it intends to adhere to its sharply curtailed rule of reason approach—and also intends to extend it to new markets entitled to the protection of the Sherman Act—review by this Court is warranted. The Second Circuit embraces an important center of commerce in the United States. The avoidance of the rule of reason analysis by that Circuit therefore raises issues of the greatest public importance.

II.

THE COURT OF APPEALS' "RESTRAINT" FORMULATION CONFLICTS WITH THIS COURT'S MANDATE IN *BMI* v. *CBS*.

In rejecting the Second Circuit's original *per se* approach to the blanket license in favor of a searching rule of reason examination in specific market contexts, this

15. *See, e.g., CBS, supra*, 441 U.S. 1 (1979); *Continental T.V., Inc.* v. *GTE Sylvania, Inc.*, 433 U.S. 36 (1977) (non-price vertical restraints); *United States* v. *Realty Multi-List, Inc.*, 629 F.2d 1351 (5th Cir. 1980) (group boycotts); J. Paul McGrath, Remarks at 18th Annual New England Antitrust Conference (Nov. 2, 1984) (joint ventures).

Court in *CBS* nowhere as much as intimated, let alone concluded, that the blanket license is not a restraint in the antitrust sense of the word. The Court's multiple observations about the undeniable characteristics of the blanket license as a restraining arrangement leave no doubt that it believed that license to be a restraint in the Sherman Act sense.

This Court in *CBS* thus recognized that: (i) the blanket license constitutes literal "price-fixing," 441 U.S. at 9; (ii) "the blanket-license fee is not set by competition among individual copyright owners," *id.* at 23; and (iii) "[b]oth [ASCAP and BMI] plainly involve concerted action in a large and active line of commerce," *id.* at 10. Justice Stevens, who agreed with rule of reason treatment for the blanket license, but who believed the record adequate to undertake the required analysis, additionally noted that "the challenged policy does have a significant adverse impact on competition," that "there is no price competition between separate musical compositions," and that the television network market "is one that could be highly competitive, but is not competitive at all." *Id.* at 26, 32-33 (Stevens, J., dissenting). These findings were consistent with all of the Government's submissions before both this Court and the Second Circuit.[16]

16. *E.g.*, the Solicitor General's brief prior to this Court's consideration of *CBS* ("U.S. 1978 Br."), while urging rule of reason treatment of the blanket license, also observed that the blanket license "has important features in common with other arrangements that, this Court has held, are *per se* illegal." *Id.*, Pet. App. F at 106a. The Solicitor General also explained, when the case reached this Court a second time after *CBS Remand*, that "the undisputed facts in this case strongly suggest that the relevant market reflects substantial deviations from the competitive norm." U.S. 1981 Br., Pet. App. H at

(footnote continued on next page)

This Court's recognition that the network blanket license "may not ultimately survive" attack under the rule of reason—even though it was evident that CBS had a "real choice," 441 U.S. at 24—confirms that this Court did not contemplate a rule of reason analysis beginning and ending with the existence of such a choice.[17] Indeed, were it otherwise, CBS's complaint would have been held insufficient by this Court based on such fact, without the need for further examination of the competitive effects of the license.

While this Court understandably might have believed after *CBS Remand*, and following the advice of the Solicitor General, that the vitality of its mandate in *CBS* would not be unduly eroded by the particular outcome in the

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128a. He pointed out that "there is no price competition among musical composers producing similar compositions, even though some composers are obviously more popular than others. Indeed, there is no existing market at all for individual performing rights. In addition, the fact that the fee for a blanket license is based on a percentage of network advertising revenues means that respondents are able to charge the more successful networks more money for the same product. Persistent price discrimination of this kind may indicate the presence of the market power of a cartel." *Id.* at 129a n.7. Accordingly, the Solicitor General stressed that it is essential to examine "the relationship between these conditions and the challenged blanket licensing scheme and [weigh] the procompetitive aspects of respondents' licensing scheme against its apparent anticompetitive effects." *Id.* at 129a.

17. Justice Stevens noted in this regard:

> The availability of a practical alternative alters the competitive effect of a blockbooking or blanket-licensing policy. ASCAP is therefore quite correct in its insistence that its blanket license cannot be categorically condemned on the authority of the blockbooking and package-licensing cases. While these cases are instructive, they do not directly answer the question whether the ASCAP practice is unlawful.
>
> *The answer to that question depends on an evaluation of the effect of the practice on competition in the relevant market.*

441 U.S. at 29 (Stevens, J., dissenting) (emphasis added).

unique circumstances of that case, the same can no longer be said after the decision below. Thus, the District Court in this case felt compelled to acknowledge that "*CBS* [*Remand*] is, of course, the controlling precedent." D. Ct. Op., Pet. App. B at 62a. The stations were accordingly put to proving, not merely the anti-competitive effects of the blanket license, which they conclusively did, but also their inability to escape the economic burdens of that license.

Notwithstanding an overwhelming record and trial court findings diametrically opposite to those in *CBS*, which demonstrated the absence of "realistic alternatives" for the local stations, the Court of Appeals simply rejected the trial court's findings out of hand,[18] once again concluding that the showing of compulsion was inadequate. Such asserted lack of evidence of compulsion was enough for the Court of Appeals: "Not having been proven to be a restraint, [the blanket license] cannot be a violation of section 1." 2d Cir. Op., Pet. App. A at 36a. The court then simply terminated its analysis, reversed the District Court's judgment, and dismissed the complaint. *Id.*[19]

It no longer can be said, then, that the Court of Appeals' "restraint" formulation is of but narrow applicability, or that it was influenced by particular tying allegations. It is now self-evidently a rule of general applicability. In

18. The Court of Appeals rendered this legal ruling without holding that any of the District Court's findings of fact were "clearly erroneous."

19. One member of the panel went so far as to declare (in direct contradiction of this Court's *CBS* ruling) that unless the copyright owners had offered the blanket license exclusively, the license could not constitute a restraint under *any* set of facts with respect to *any* class of music users. 2d Cir. Op., Pet. App. A at 37a (Winter, C.J., concurring).

the process of developing this rule, the Court of Appeals has come full circle, from declaring the blanket license *per se* unlawful to declaring it virtually *per se* lawful, and has done so without the benefit of a proper antitrust analysis and in defiance of this Court's mandate.

III.

THE DECISION BELOW CONFLICTS WITH RULE OF REASON DECISIONS IN OTHER CIRCUITS.

The Second Circuit's approach to the rule of reason directly conflicts with decisions from other circuits which properly have refused to give a plaintiff's ability to avoid the harmful effects of a practice dispositive significance under the rule of reason. To cite but one example, in *Kentucky Fried Chicken Corp.* v. *Diversified Packaging Corp.*, 549 F.2d 368 (5th Cir. 1977), the court emphasized that while the existence of alternative suppliers for the franchisor's quality control program was fatal to a supplier's tying claim under the *per se* doctrine, *id.* at 377-79, "[t]he presence of such alternatives is a factor to be considered in the [rule of reason] analysis, but it is not necessarily the decisive factor." *Id.* at 381. Decisions from other circuits likewise recognize that the rule of reason requires an analysis of *all* the circumstances affecting competition, and that "no single aspect is dispositive."[20] This

20. *Harold Friedman Inc.* v. *Thorofare Markets Inc.*, 587 F.2d 127, 143 (3d Cir. 1978). *Accord, White and White, Inc.* v. *American Hospital Supply Corp.*, 723 F.2d 495, 505 (6th Cir. 1983); *Ratino* v. *Medical Service of the District of Columbia*, 718 F.2d 1260, 1269 (4th Cir. 1983); *Graphic Products Distributors, Inc.* v. *Itek Corp.*, 717 F.2d 1560, 1566 n.7 (11th Cir. 1983); *Betaseed, Inc.* v. *U and I Inc.*, 681 F.2d 1203, 1228 (9th Cir. 1982); *Rosebrough Mon-*

(footnote continued on next page)

Court should, we submit, grant certiorari to resolve the conflict among the circuits thus presented.

Although the rule of law applied by the Second Circuit is in sharp conflict with the rule applied in other circuits, the Second Circuit's continued adherence to that rule threatens to generate substantial confusion in the lower courts concerning the issues to be tried in a federal antitrust case brought under the rule of reason. Parties to anti-competitive agreements are sure to defend their practices by asserting that, even though they have suppressed rivalry among themselves, the plaintiff has no cause of action because there exists some theoretical means by which to circumvent the agreement. Indeed, defendants in industries as diverse as motion picture production and distribution, *General Cinema Corp.* v. *Buena Vista Distribution Co.*, 532 F. Supp. 1244, 1261 (C.D. Cal. 1982), and professional sports, *North American Soccer League* v. *National Football League*, 505 F. Supp. 659, 687 (S.D.N.Y. 1980), *aff'd in part and rev'd in part*, 670 F.2d 1249 (2d Cir.), *cert. denied*, 459 U.S. 1074 (1982), already have attempted to rely on *CBS Remand* to forestall assessments of the full competitive implications of their practices. This development is an additional cause for concern, and demonstrates that the impact of the Court of Appeals' ruling is not confined to the Second Circuit or to the copyright music market.

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ument Co. v. *Memorial Park Cemetery Association*, 666 F.2d 1130, 1138 (8th Cir. 1981), *cert. denied*, 457 U.S. 1111 (1982); *Smith* v. *Pro Football, Inc.*, 593 F.2d 1173, 1178 (D.C. Cir. 1978). *See also Tekton, Inc.* v. *Builders Bid Service of Utah, Inc.*, 676 F.2d 1352, 1354 (10th Cir. 1982); *United States* v. *Realty Multi-List, Inc.*, 629 F.2d 1351, 1362 (5th Cir. 1980); *Eastern Scientific Co.* v. *Wild Heerbrugg Instruments, Inc.*, 572 F.2d 883, 885 (1st Cir.), *cert. denied*, 439 U.S. 833 (1978).

The defense which now has been accepted by the Second Circuit is a serious blow to the effectiveness of the private antitrust remedy, which this Court repeatedly has declared to be an essential tool for the preservation of our free enterprise economy. Such a defense will obviously inhibit the ability of private parties, such as the complaining stations, to obtain competition in their markets through injunctive relief. In view of the serious economic consequences of the Court of Appeals' devitalizing (and erroneous) construction of the antitrust laws, its disregard of this Court's instructions, and the divergence among the circuits, review by this Court is fully warranted.

Conclusion

For the reasons set forth above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

IRA M. MILLSTEIN
767 Fifth Avenue
New York, New York 10153
(212) 310-8000
Counsel of Record

Of Counsel:
JAMES W. QUINN
R. BRUCE RICH
KENNETH L. STEINTHAL
LOIS PEEL EISENSTEIN
MARTIN J. SILVERMAN
WEIL, GOTSHAL & MANGES

APPENDICES

APPENDIX A

Opinion of the Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 7, 235, 236—August Term, 1983

Argued: November 1, 1983
Finally Submitted: January 18, 1984

Decided September 18, 1984

Docket Nos. 83-7058, 83-7060, 83-7062

BUFFALO BROADCASTING COMPANY, INC., KID BROADCASTING CORPORATION, KWTX BROADCASTING COMPANY, INC., METROMEDIA, INC., and STORER BROADCASTING COMPANY, on behalf of themselves and ALL PERSONS OR ENTITIES WHO OWN LOCAL TELEVISION STATIONS WHICH OBTAIN MUSIC LICENSE AGREEMENTS WITH AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS AND/OR BROADCAST MUSIC, INC.,

Plaintiffs-Appellees,

v.

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, STANLEY ADAMS, as President of American Society of Composers, Authors and Publishers, CY COLEMAN, HAL DAVID, FAMOUS MUSIC CORP., MCA, INC., MORTON GOULD, SHAPIRO, BERNSTEIN & CO., INC., on behalf of themselves and all other members of American Society of Composers, Authors and Publishers, BROADCAST MUSIC, INC., AL GALLICO MUSIC CORP., PAUL ANKA, JERRY BOCK, SHELDON HARNICK, HOLLIS MUSIC, INC. and UNART MUSIC CORP., on behalf of themselves and all other affiliates of Broadcast Music, Inc.,

Defendants-Appellants.

Before:

NEWMAN, WINTER, and PRATT,*

Circuit Judges.

Appeal from a judgment of the District Court for the Southern District of New York (Lee P. Gagliardi, Judge) enjoining American Society of Composers, Authors and Publishers and Broadcast Music, Inc. from licensing music performing rights in "syndicated" television programs to local television stations. The injunction issued after a decision holding the ASCAP and BMI blanket licenses to local television stations for music performing rights to be an unreasonable restraint of trade in violation of section 1 of the Sherman Antitrust Act, 15 U.S.C. § 1 (1982). 546 F. Supp. 274.

Reversed. Judge Winter concurs with a separate opinion.

JAY TOPKIS, New York, N.Y. (Allan Blumstein, Andrew J. Peck, Fred D. Heather, Gerard E. Harper, Richard H. Reimer, Paul, Weiss, Rifkind, Wharton & Garrison, and Bernard Korman, Gen. Counsel, ASCAP, New York, N.Y., on the brief), for defendants-appellants American Society of Composers, Authors and Publishers, et al.

ROBERT J. SISK, New York, N.Y. (Norman C. Kleinberg, Edward W. Chapin, Michael E. Salzman, Naomi F. Sheiner, Jacqueline D. Gilbert, William H. Voth, Hughes Hubbard & Reed, New York, N.Y., on the brief), for defendant-appellant Broadcast Music, Inc.

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* After oral argument, Judge Cardamone recused himself and was replaced by Judge Pratt, who has had the benefit of a transcript of the oral argument.

BARRY H. GARFINKEL, New York, N.Y. (William Hughes Mulligan, Timothy A. Nelsen, Richard M. Schwartz, Skadden, Arps, Slate, Meagher & Flom, New York, N.Y., on the brief), for defendants-appellants Al Gallico Music Corp., Sheldon Harnick, Hollis Music, Inc., Unart Music Corp., and the class of affiliates of Broadcast Music, Inc.

IRA M. MILLSTEIN, New York, N.Y. (James W. Quinn, R. Bruce Rich, Jay N. Fastow, Kenneth L. Steinthal, Lois Peel Eisenstein, David B. Stern, Weil, Gotshal & Manges, New York, N.Y., on the brief), for plaintiffs-appellees.

(Frederick F. Greenman, Jr., Alvin Deutsch, Edward Klagsbrun, Bernard G. Schneider, Linden and Deutsch, New York, N.Y., submitted a brief for amicus curiae American Guild of Authors and Composers/The Songwriters Guild.)

(Stephen A. Kroft, Sondra E. Berchin, Karen Magid, Rosenfeld, Meyer & Susman, Beverly Hills, Calif., submitted a brief for amicus curiae Motion Picture and Television Producers and Syndicators.)

(Robert M. Lichtman, Daniel L. Koffsky, Wald, Harkrader & Ross, Washington, D.C., Philip Elman, Washington, D.C., Michael J. Freegard, Chief Exec. Officer, Performing Right Society Limited, London, England, Jean-Loup Tournier, Le Directeur General, Societe des Auteurs, Compositeurs et Editeurs de Musique, Paris, France, submitted a brief for amici curiae The Performing Right Society Limited and Societe des Auteurs, Compositeurs et Editeurs de Musique.)

(Irwin Karp, Port Chester, N.Y., submitted a brief for amicus curiae Authors League of America, Inc.)

(Frank H. Easterbrook, Chicago, Ill., submitted a brief for amici curiae Chappell & Co., et al.)

(Marvin E. Frankel, Stuart J. Baskin, Kramer, Levin, Nessen, Kamin & Frankel, New York, N.Y., submitted a brief for amici curiae Aaron Copland, et al.)

(John H. Midlen, Jr., Washington, D.C., submitted a brief for amicus curiae Old-Time Gospel Hour.)

JON O. NEWMAN, *Circuit Judge:*

Once again we consider the lawfulness under section 1 of the Sherman Antitrust Act of the blanket license offered by the American Society of Composers, Authors and Publishers (ASCAP) and Broadcast Music, Inc. (BMI). The license permits the licensee to perform publicly any musical composition in the repertory of the licensor. In this litigation the blanket license is challenged by a class of licensees comprising all owners of "local" television stations in the United States, *i.e.*, stations not owned by any of the three major television networks, ABC, CBS, and NBC. After a bench trial in the District Court for the Southern District of New York (Lee P. Gagliardi, Judge), the blanket license was held to be an unreasonable restraint of trade. *Buffalo Broadcasting Co. v. ASCAP,* 546 F. Supp. 274 (S.D.N.Y. 1982). ASCAP and BMI were enjoined from licensing to local television stations non-dramatic music performing rights for any "syndicated" program. For reasons that follow, we conclude that the evidence was insufficient as a matter of law to show that the blanket license is an unlawful restraint of trade in the legal and factual context in which it currently exists. We therefore reverse the judgment of the District Court.

Background

I. The Parties

The five named plaintiffs own and operate one or more local television stations. They represent a class of all owners of local television stations in the United States who obtain music performing rights pursuant to license agreements with ASCAP and/or BMI. The class does not include the three major television networks, ABC, CBS, and NBC, each of which owns five television stations. The class includes approximately 450 owners who, because of multiple holdings, own approximately 750 local television stations. Only one owner has opted out of the class. The class includes some relatively small corporations that own a single station with relatively modest revenue and some major corporations with significant television revenue and profits, such as Metromedia, Inc., which owns seven stations including those in the major markets of New York City (WNEW-TV) and Los Angeles (WTTV). Since 1949 most stations have been represented in negotiations with ASCAP and BMI by the All-Industry Television Station Music License Committee ("the All-Industry Committee").

Defendant ASCAP is an unincorporated membership association of composers, authors, and publishers of music, formed in 1914. It has approximately 21,000 writer and 8,000 publisher members. It holds non-exclusive licenses for the non-dramatic performing rights to more than three million musical compositions. BMI is a non-profit corporation organized in 1939 by radio broadcasters. It has approximately 38,000 writer and 22,000 publisher affiliates. Its repertory, for which it holds non-exclusive licenses for non-dramatic performing rights, includes more than one

million compositions. The eleven individual defendants represent two classes of defendants that include all persons from whom ASCAP and BMI have obtained the non-exclusive right to license non-dramatic music performing rights to others.

II. Music, Rights, and Licenses

The subject matter of this litigation is music transmitted by television stations to their viewer-listeners. Television music is classified as either theme, background, or feature. Theme music is played at the start or conclusion of a program and serves to enhance the identification of the program. Background music accompanies portions of the program to heighten interest, underscore the mood, change the pace, or otherwise contribute to the overall effect of the program. Feature music is a principal focus of audience attention, such as a popular song sung on a variety show.

More particularly, we are concerned with the licensing of non-dramatic performing rights to copyrighted music, that is, the right to "perform" the music publicly by transmitting it, whether live or on film or tape, to television audiences.[1] This performance right is created by the Copyright Act as one of the exclusive rights enjoyed by the copyright owner. 17 U.S.C. § 106(4) (1982). Also pertinent to this litigation is the so-called synchronization right, or "synch" right, that is, the right to reproduce the

1. A non-dramatic performing right is the right to perform a musical composition other than in a dramatic performance, which the ASCAP blanket license defines as "a performance of a musical composition on a television program in which there is a definite plot depicted by action and where the performance of the musical composition is woven into and carries forward the plot and its accompanying action." *See* 3 *Nimmer on Copyright* § 10.10[E].

music onto the soundtrack of a film or a videotape in synchronization with the action. The "synch" right is a form of the reproduction right also created by statute as one of the exclusive rights enjoyed by the copyright owner. *Id.* § 106(1). The Act specifically accords the copyright owner the right to authorize others to use the various rights recognized by the Act, including the performing right and the reproduction right, *id.* § 106, and to convey these rights separately, *id.* § 201(d)(2). The Act recognizes that conveyance of the various rights protected by copyright may be accomplished by either an exclusive or a non-exclusive license. *Id.* § 101.

Music performed by local television stations is selected in one of three ways. It may be selected by the station itself, or by the producer of a program that is sold to the station, or by a performer spontaneously. The stations select music for the relatively small portion of the program day devoted to locally produced programs. The vast majority of music aired by television stations is selected by the producers of programs supplied to the stations. In some instances these producers are the major television networks, but this litigation is not concerned with performing rights to music on programs supplied to the local stations by the major networks because the networks have blanket licenses from ASCAP and BMI and convey performing rights to local stations when they supply network programs. Apart from network-produced programs, the producers of programs for local stations are "syndicators" supplying the stations with "syndicated" programs. Most syndicated programs are feature length movies or one-hour or half-hour films or videotapes produced especially for television viewing by motion picture studios, their

television production affiliates, or independent television program producers. However, the definition of "syndicated program" that was stipulated to by the parties also includes live, non-network television programs offered for sale or license to local stations.[2] These syndicated programs are the central focus of this litigation. The third category of selected music, songs chosen spontaneously by a performer, accounts for a very small percentage of the music aired by the stations. These spontaneous selections of music can occur on programs produced either locally or by the networks or by syndicators.

Syndicators wishing to include music in their programs may either select pre-existing music (sometimes called "outside" music) or hire a composer to compose original music (sometimes called "inside" music). Most music on syndicated programs, up to 90% by plaintiffs' estimate, is inside music commissioned through the use of composer-for-hire agreements between the producer and either the composer alone or the composer and a corporation entitled to contract for a loan of the composer's services. Composer-for-hire agreements are normally standard form contracts. The salary paid to the composer, sometimes called "up front money," varies considerably from a few hundred dollars to several thousand dollars. The producer for whom a "work made for hire" was composed is considered by the Act to be the author and, unless the producer and composer have otherwise agreed, owns "all of the rights comprised in the copyright." *Id.* § 201(b). However, composer-for-hire agreements for syndicated televi-

2. The stipulation defines "syndicated program" as "a theatrical motion picture, pre-recorded television program or live television program which is offered for sale or license to a television station to be broadcast by that station as a non-network program."

sion programs typically provide that the producer assigns to the composer and to a music publishing company the performing right to the music composed pursuant to the agreement.[3]

When the producer wishes to use outside music in a film or videotape program, it must obtain from the copyright proprietor the "synch" right in order to record the music on the soundtrack of the film or tape. "Synch" rights vary in price, usually within a range of $150 to $500. When the producer wishes to use inside music, as is normally the case, it need not obtain the "synch" right because it already owns this right by virtue of the "work made for hire" provision of the Act.

Whether the producer decides to use outside or inside music, it need not acquire the television performing right since neither the making of the program nor the selling of the program to a television station is a "performance" of the music that would require a performing right. The producer is therefore free either to sell the program without the performing right and leave it to the station to obtain that right, or to obtain the performing right from the copyright proprietor, usually the composer and a publishing company, and convey that music performing right to the station along with the performing rights to all other copyrighted components of the program. If the producer obtains the music performing right from the copyright proprietor and conveys it to the station, the transaction is known as "source licensing" or "clearance at the source." If the station obtains the music performing right directly

3. The assignment of performing rights from the producer to the composer and publishing company is typically not an assignment of all performing rights, but the exceptions are not pertinent to this litigation.

from the copyright proprietor, the transaction is known as "direct licensing."

The typical arrangement whereby local television stations acquire music performing rights in syndicated and all other programs is neither source licensing nor direct licensing. Instead, the stations obtain from ASCAP and BMI a blanket license permitting television performance of all of the music in the repertories of these organizations. The license is conveyed for a fee normally set as a percentage of the station's revenue. That fee, after deduction of administrative expenses, is distributed to the copyright proprietors on a basis that roughly reflects the extent of use of the music and the size of the audience for which the station "performed" the music. The royalty distribution is normally divided equally between the composer and the music publishing company.

In addition to offering stations a blanket license, ASCAP and BMI also offer a modified form of the blanket license known as a "program" or "per program" license. The program license conveys to the station the music performing rights to all of the music in the ASCAP or BMI repertory for use on the particular program for which the license is issued. The fee for a program license is a percent of the revenue derived by the station from the particular program, *i.e.*, the advertising dollars paid to sponsor the program.

The blanket license contains a "carve-out" provision exempting from the base on which the license fee is computed the revenue derived by the station from any program presented by motion picture or transcription for which music performing rights have been licensed at the source by the licensor, *i.e.*, ASCAP or BMI. The program license

contains a more generous version of this provision, extending the exemption to music performing rights licensed at the source *either* by ASCAP/BMI *or* by the composer and publisher. Thus, for film and videotaped syndicated programs, a station can either obtain a blanket license for all of its music performing rights and reduce its fee for those programs licensed at the source by ASCAP/BMI, or obtain program licenses for each of its programs that use copyrighted music and avoid the fee for those programs licensed at the source by either ASCAP/BMI or by the composers and publishers.

III. Prior Litigation

The merits of the current lawsuit cannot properly be assessed without consideration of the extensive history of litigation concerning the licensing of music performing rights. In 1941 an antitrust suit brought by the United States against ASCAP and BMI was settled by entry of consent decrees,[4] imposing some limitations on the operations of ASCAP and BMI. Those decrees, however, permitted ASCAP and BMI to obtain exclusive licenses for music performing rights from their members and affiliates. The exclusive nature of these licenses prevented those requiring performing rights from negotiating directly with composers for rights to individual compositions. That limitation precipitated suit by operators of movie theaters, who successfully challenged the blanket license they were obliged to take from ASCAP in order to exhibit films with music from the ASCAP repertory. *Alden-Rochelle, Inc. v. ASCAP*, 80 F. Supp. 888 (S.D.N.Y. 1948). *See also M.*

4. *United States v. ASCAP*, 1940-43 Trade Cas. (CCH) ¶ 56,104 (S.D.N.Y. 1941); *United States v. BMI*, 1940-43 Trade Cas. (CCH) ¶ 56,098 (S.D.N.Y. 1941).

Witmark & Sons v. Jensen, 80 F. Supp. 843 (D. Minn. 1948), *appeal dismissed*, 177 F.2d 515 (8th Cir. 1949).

The restraining nature of the ASCAP blanket license, as applied to movie theater operators, prompted the Government to reopen the 1941 ASCAP consent decree and secure in 1950 a significant amendment.[5] The amended decree, known as the "Amended Final Judgment," prohibits ASCAP from acquiring exclusive music performing rights, limiting it solely to non-exclusive rights. ASCAP is also prohibited from limiting, restricting, or interfering with the right of any member to issue to any user a non-exclusive license for music performing rights.

The Amended Final Judgment requires ASCAP to grant a blanket license to anyone requesting it. The decree also requires ASCAP to offer to any television or radio broadcaster a program license. ASCAP is also required "to use its best efforts to avoid any discrimination among the respective fees fixed for the various types of licenses which would deprive the licensees or prospective licensees of a genuine choice from among such various types of licenses." Amended Final Judgment, ¶ VIII, 546 F. Supp. at 278 n.6. Finally, in the event license applicants believe they are being overcharged, the decree permits any applicant for a blanket or program license to apply to the District Court for the determination of a "reasonable" fee, and in such a proceeding, "the burden of proof shall be on ASCAP to establish the reasonableness of the fee requested by it." *Id.* ¶ IX(A), 546 F. Supp. at 278-79 n.6.

In 1951 local television stations instituted suit pursuant to the Amended Final Judgment to determine reasonable

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5. *United States v. ASCAP*, 1950-51 Trade Cas. (CCH) ¶ 62,595 (S.D.N.Y. 1950). The BMI consent decree was amended in 1966, *United States v. BMI*, 1966 Trade Cas. ¶ 71,941 (S.D.N.Y. 1966).

license fees and terms. *United States v. ASCAP (Application of Voice of Alabama, Inc.)*, Civ. No. 13-95 (S.D.N.Y. 1951). In 1954 the parties reached agreement to set the per program license rate at 9% of the revenue of programs using ASCAP music and to reduce the blanket license rate to 2.05% of total station revenue, less certain deductions. In light of this agreement the *Voice of Alabama* proceeding was discontinued.

In 1961 local television stations requested from ASCAP a modified blanket license that excluded syndicated programs. When ASCAP refused, the stations sued in the consent decree court to require ASCAP to issue such a license. The District Court declined to require such a license, *United States v. ASCAP (Application of Shenandoah Valley Broadcasting, Inc.)*, 208 F. Supp. 896 (S.D.N.Y. 1962), *aff'd*, 331 F.2d 117 (2d Cir.), *cert. denied*, 377 U.S. 997 (1964). In affirming, this Court observed that if the blanket license was serving to restrain trade unreasonably in violation of the antitrust laws, the stations' remedy was to urge the Department of Justice to seek modification of the consent decree or to initiate a private suit. 331 F.2d at 124.

Rather than press an antitrust challenge, the stations initiated another round of fee determination pursuant to the consent decree. That litigation, known as the *Shenandoah* proceeding, was settled upon the parties' agreement that the form of blanket and program licenses then in use "may be entered into lawfully by each party to this proceeding" and that the rate for the blanket license was reduced to 2% of 1964-65 revenue plus 1% of incremental revenue above that base. *United States v. ASCAP (Application of Shenandoah Valley Broadcasting, Inc.)*, Civ. No.

13-95 (S.D.N.Y. July 28, 1969) (final order). The All-Industry Committee reported to the stations that this rate reduction would save them approximately $53 million through 1977, an estimate that was exceeded because of the rapid growth of station revenue.

Thereafter, while the local television stations took blanket licenses from ASCAP and BMI, the legality of the license was challenged by a network licensee, CBS. Its suit, filed in 1969, was dismissed by Judge Lasker after an eight-week trial. *CBS, Inc. v. ASCAP,* 400 F. Supp. 737 (S.D.N.Y. 1975). Judge Lasker ruled that the evidence failed to show that the blanket license restrained CBS from obtaining music performing rights to individual compositions if it chose to seek and pay for them. On appeal, this Court reversed, ruling that the blanket license was an unlawful price-fixing device, a *per se* violation of section 1. *CBS, Inc. v. ASCAP,* 562 F.2d 130 (2d Cir. 1977). That decision was reversed by the Supreme Court, which ruled that the blanket license was not a *per se* violation of section 1. *BMI, Inc. v. CBS, Inc.,* 441 U.S. 1 (1979). Upon remand from the Supreme Court, we affirmed Judge Lasker's decision, agreeing that the blanket license had not been proven to be a restraint of trade. *CBS, Inc. v. ASCAP,* 620 F.2d 930 (2d Cir. 1980) (*"CBS-remand"*), *cert. denied,* 450 U.S. 970 (1981).

Perhaps encouraged by our 1977 ruling in favor of CBS, the local stations began this litigation in 1978. A four-week bench trial occurred in 1981 before Judge Gagliardi, resulting in the decision now on appeal. That decision holds that the blanket licensing of music performing rights to local television stations unreasonably restrains trade in violation of section 1 and enjoins ASCAP and BMI from granting

to local television stations music performing rights in any syndicated programs. With respect to syndicated programs, the injunction thus bars ASCAP and BMI from offering either blanket or program licenses and also prohibits them from conveying performing rights with respect to such programs on any basis at all.

Discussion

A. Estoppel

As a threshold issue, ASCAP contends that the local stations are estopped from challenging the lawfulness of the blanket license as applied to them by reason of the position they took in settlement of the *Shenandoah* rate determination proceeding. Specifically, ASCAP relies on the fact that the stations settling that litigation represented to the District Court that the ASCAP blanket license "may be entered into lawfully" and that ASCAP in effect bargained for that representation by giving up at least $53 million in license fees. There is undeniable force to the contention that those who secured benefits exchanged in part for a representation to the District Court that the blanket license is lawful ought not to be heard to assert the contrary. *See Chance v. Board of Examiners*, 561 F.2d 1079, 1092 (2d Cir. 1977). But the argument is not necessarily a winning one for three reasons: It was not asserted in the trial court, it rests on a consent decree that applied to a term of years ending in 1977, and its force in the antitrust context is not free from doubt. *Cf. Bernstein v. Universal Pictures, Inc.*, 517 F.2d 976, 981-82 (2d Cir. 1975) (plaintiff who has previously asserted contrary legal position still deserving of antitrust relief).

We are persuaded to move past the estoppel argument, without determining its validity, and consider the merits of the lawsuit. In the first place, the argument is a matter of considerable dispute, and, if not forfeited by failure to raise it in the trial court, the argument comes to us on a record that inadequately develops the facts as to whom the estoppel binds and whom it benefits. Second, even if the estoppel argument bars the claims of those local television stations for whom the All-Industry Committee spoke when negotiating the *Shenandoah* settlement, it is not at all clear that it would bar the claims of the approximately 200 stations that have come into existence since the 1969 settlement. Finally, there is uncertainty whether the estoppel would inure to the benefit of ASCAP's co-defendant, BMI, which was not a party to the *Shenandoah* proceeding. Without resolving our doubts on these points, we proceed to consider the merits of the dispute.

B. Is There a Restraint?

We think the initial and, as it turns out, dispositive issue on the merits is whether the blanket licensing of performing rights to the local television stations has been proven to be a restraint of trade. *See CBS-remand, supra,* 620 F.2d at 934-35. Arguably the answer is *a fortiori* after the Supreme Court's decision and our decision on remand in the CBS litigation. The Supreme Court noted that "the necessity for and advantages of a blanket license for [television and radio networks] may be far less obvious than is the case when the potential users are individual television or radio stations . . . ." 441 U.S. at 21. And on remand we upheld the blanket license against the claim of a network. However, for several reasons, it does not follow that the

local stations lose simply because the CBS network lost. First, the Supreme Court's observation concerned the relative pro-competitive effects of the blanket license for a network compared to local stations. Even though the pro-competitive effects may be greater when the licensees are local stations, those pro-competitive effects do not necessarily outweigh the anti-competitive effects. Second, the Supreme Court's comparative statement does not determine the threshold issue of whether the blanket licensing of performing rights to local television stations is a restraint at all. The fact that CBS did not prove that blanket licensing of networks restrained competition does not necessarily mean that blanket licensing of local stations may not be shown to be a restraint. Finally, in *CBS-remand* we reviewed a District Judge's ruling that no restraint had been proved; here, we review a ruling that the local stations proved the existence of a restraint.

In reaching his conclusions as to the existence of a restraint, Judge Gagliardi endeavored to apply the mode of analysis we had used in *CBS-remand*. We there noted that trade is restrained, sometimes unreasonably, when rights to use individual copyrights or patents may be obtained only by payment for a pool of such rights, but that the opportunity to acquire a pool of rights does not restrain trade if an alternative opportunity to acquire individual rights is realistically available. 620 F.2d at 935-36. We recognized, as CBS had urged, that a plaintiff will not be held to have an alternative "available" simply because some imaginable possibility exists. We agreed that CBS's "alternative" of hiring composers to fill its need for music was not the sort of realistic alternative that prevented the blanket license from being a restraint. "An antitrust plaintiff is not obliged to pursue any imaginable alternative, regardless of

cost or efficiency, before it can complain that a practice has restrained competition." *Id.* at 936. What we examined in *CBS-remand,* as Judge Lasker had done in the District Court, was whether the plaintiff had proved that it lacked a realistic opportunity to obtain performance rights from individual copyright holders.

We continue to believe that this is the appropriate inquiry, especially in light of the Supreme Court's recent decision concerning the NCAA's attempt to regulate the televising of college football games. *NCAA v. Board of Regents of the University of Oklahoma,* 104 S. Ct. 2948 (1984). Two aspects of that ruling are especially pertinent. First, the Court was there concerned, as we are here, with an agreement whereby a pool of rights was conveyed. In determining that the agreement constituted a restraint, the Court stated, "[S]ince as a *practical* matter all member institutions need NCAA approval, members have no *real* choice but to adhere to the NCAA's television controls." *Id.* at 2963 (emphasis added) (footnote omitted). Thus, the restraining effect of the challenged agreement arose not by virtue of its terms alone, but because as a "practical" matter no "real" alternative existed whereby individual negotiations could occur between member schools and television broadcasters. Second, the Court had occasion to characterize the blanket license for music performing rights that it had sustained against a *per se* challenge in *CBS* and stated that under the blanket license "each individual remained free to sell his own music *without restraint.*" *Id.* at 2968 (emphasis added).[6] *NCAA* thus reinforces our view that

6. *See also Arizona v. Maricopa County Medical Society,* 102 S. Ct. 2466, 2479 (1982) ("the blanket license arrangement [in *CBS*] did not place any restraint on the right of any individual copyright owner to sell his own compositions separately to any buyer at any price) (footnote omitted).

the first issue is whether the local television stations have proven that they lack, as a "practical" matter, a "real" alternative to the blanket license for obtaining music performing rights.

In reaching the conclusion that plaintiffs had proven the lack of realistically available alternatives to the blanket license, Judge Gagliardi gave separate consideration to three possibilities: the program license,[7] direct licensing, and source licensing. We consider each in turn.

Program License. Judge Gagliardi based his conclusion that a program license is not realistically available to the plaintiffs essentially on two circumstances: the cost of a program license and the reporting requirements that such a license imposes on a licensee. "The court therefore concludes that the per program license is too costly and burdensome to be a realistic alternative to the blanket license." 546 F. Supp. at 289 (footnote omitted). Without rejecting any subsidiary factual finding concerning the availability of a program license, we reject the legal conclusion that it is not a realistic alternative to the blanket license.

The only fact found in support of the conclusion that the program license is "too costly" is that the rates for such licenses are seven times higher than the rates for blanket licenses. *Id.* The program license rate is 9%; the blanket

7. The program license is not an alternative means of obtaining performing rights to individual compositions since it permits the licensee to use all compositions in the repertory of the licensor for an individual program. Its use would not afford a station a choice among competitive prices of performing rights for individual compositions. Nevertheless, to whatever extent it is available, it is an alternative means of obtaining performing rights needed to broadcast one program. Moreover, the program license, if available, may facilitate the stations' efforts to pursue direct licensing and source licensing, as we discuss later in the text. In any event, the parties joined issue as to whether it is a realistically available alternative, the District Court ruled on the issue, and we review that ruling.

license rate is between 1% and 2%. This difference in rates does not support the District Court's conclusion for several reasons. First, the rates are charged against different bases. The blanket license rate is applied to a station's total revenue; the program license rate is applied only to revenue from a particular program. Since the base for the blanket license fee includes revenue from network programs, for which the networks have already acquired performing rights by virtue of their blanket licenses, as well as some local programs that use no music, it is inevitable that the rate for a local station's blanket license will be less than the rate for a program license taken solely to permit use of music on a particular program.

Second, the degree of difference between the two rates is largely attributable to the stations themselves. In negotiating a revision of license rates in the *Shenandoah* proceeding in 1969, the All-Industry Committee elected not to press for reduction of the program license rate and instead concentrated on securing a reduction of the blanket license rate, believing, as it informed the broadcasters it represented, that "the critical matter at this time was to get the best possible blanket license." Having preferred to win a lower price for only the blanket license, the stations are in no position to point to the widened differential between rates to show that program licenses are not realistically available.

Third, the only valid test of whether the program license is "too costly" to be a realistic alternative is whether the price for such a license, in an objective sense, is higher than the value of the rights obtained. But plaintiffs presented no evidence that the price of the program license

is "high" in terms of value received.[8] Instead, they rely, as did the District Court, on a comparison between the program license rate and the blanket license rate. That comparison, defendants contend, leads to the anomalous result that the more the blanket license is a bargain, the more it is likely to be a restraint. The anomaly is more apparent than real. Within reasonable price ranges, the program license is not an unrealistic alternative to the blanket license simply because the rate for the latter is less. The differential in rates may reflect the inherent difference in the bundle of rights being conveyed. Even if the blanket license is objectively the "better buy" for most users, the program license would be a realistic alternative so long as it was fairly priced for those who might find it preferable for reasons other than price. But if the program license were available only at a price beyond any objectively reasonable range, the "bargain" nature of the blanket license would not immunize it from characterization as a restraint. Sellers of alternatives may not set absurdly high prices at which they have no real intention of making sales and then point to the cheaper price of the package under attack to argue that it is not a restraint but the object of customer preference.

Thus, while the relative cheapness of the blanket rate does not necessarily mean that it is not a restraint, the

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8. Though the record contains no evidence that the price stations are asked to pay for a program license is higher than the value of the rights received, there is no doubt that plaintiffs have confidence that such value is determinable. For example, in complaining that the blanket license is too expensive, plaintiffs cite the fact that license fees paid by station KWTX to ASCAP and BMI for all of its music equal 80% of the station's cost for its syndicated programs and allege that this percentage makes "manifest" the "lack of proportion" between paying for performing rights based on station revenue and "the actual *value* of the music" (emphasis added). Brief for Appellees at 55-56 n.77.

absence of evidence that the program license has been artificially priced higher than is reasonable for value received bars any conclusion that the program license is "too costly" to be a realistic alternative. The fact that very few stations have elected to take program licenses is not evidence that they are priced beyond an objectively reasonable price range. It may simply reflect, as defendants believe, that the blanket license has virtues of convenience that make it a legitimate object of customer preference.

Fourth, even if there were evidence that showed the program license rate to be too "high," that price is always subject to downward revision by Judge Conner, who currently supervises the administration of the Amended Final Judgment. Two aspects of that judgment are especially pertinent to any claim that the price of the program license is too "high." In a proceeding to redetermine rates, the burden is on ASCAP to prove the reasonableness of the rates charged, and the judgment expressly requires ASCAP "to use its best efforts to avoid any discrimination among the respective fees fixed for the various types of licenses which would deprive the licensees or prospective licensees of a *genuine choice* from among such various types of licenses," Amended Final Judgment ¶ VIII, 546 F. Supp. at 278 n.6 (emphasis added). The availability of a judicially enforceable requirement of a "reasonable" fee precludes any claim that the program license rate is too high, especially in the context of television stations regularly represented by a vigorous committee with the demonstrated resources, skill, and willingness to invoke the rate-adjustment process.

In addition to cost, Judge Gagliardi considered the program license not realistically available because of the

burdens of required record-keeping that accompany its use. This conclusion is similarly flawed by the lack of evidence that the record-keeping requirements have been unnecessarily imposed. Since the program license permits only selective use of copyrighted music, it is inevitable that some reporting requirements would be reasonable to assure proper use. The District Court made no finding that any aspect of the record-keeping is objectively unnecessary, and plaintiffs offered no evidence to this effect. As with price, the apparent benefit of the blanket license in sparing the user record-keeping may simply reflect inherent differences in the two products. In any event, the program license has been shown only to require more record-keeping than the blanket license; it has not been shown to require burdens objectively unreasonable, such as would support a conclusion that the program license is not realistically available. Finally, though we do not decide the point, it would appear that any aspect of the record-keeping requirement that prevents the stations from having a "genuine choice" between the program and the blanket license would be subject to revision under the Amended Final Judgment.

The lack of evidence that the program license is not realistically available has a two-fold significance in determining whether the blanket license has been shown to be a restraint. First, the program license itself remains as an alternative to the blanket license for the local stations to acquire performing rights to the music on all of their syndicated programs. That consequence is not necessarily determinative since the program license is in reality a limited form of the blanket license and, like the blanket license, is subject to the objection that its use by stations would continue the present practice whereby no price competition occurs among individual songs with respect to

licensing of performing rights. However, the availability of the program license has a second and more significant consequence: The program license provides local stations with a fall-back position in the event that they forgo the blanket license and then encounter difficulty in obtaining performing rights to music on some syndicated programs either by direct licensing or by source licensing. Whether those alternatives were proven to be unavailable as realistic alternatives is our next inquiry.

Direct Licensing. The District Court concluded that direct licensing is not a realistic alternative to the blanket license without any evidence that any local station ever offered any composer a sum of money in exchange for the performing rights to his music. That evidentiary gap exists despite the 21-year interval between entry of the Amended Final Judgment and the trial of this case, during which the local stations had ample opportunity to determine whether performing rights could be directly licensed.

The District Court declined to attach any significance to the absence of purchase offers from stations directly to copyright proprietors for two related reasons. Judge Gagliardi concluded, first, that direct licensing could not occur without the intervention of some agency to broker the numerous transactions that would be involved and, second, that the television stations lack the market power to induce anyone to come forward and perform that brokering function. 546 F. Supp. at 200. We have no quarrel with the first proposition. Some intermediary would seem essential to negotiate performing rights licenses between thousands of copyright proprietors and hundreds of local stations, in the same manner that the Harry Fox Agency for years has brokered licenses for "synch" rights between copyright proprietors and program producers.

However, we see no evidentiary support for the District Court's second proposition—that no one would undertake the brokering function for direct licensing of performing rights. Judge Gagliardi was led to this conclusion, not on the basis of any evidence of an expressed reluctance on anyone's part to broker direct licensing, but because of his view of the difference between the market power of CBS and that of the local television stations. In *CBS* Judge Lasker had found, 400 F. Supp. at 779, and we emphasized, 620 F.2d at 938, that if CBS were to seek direct licensing, "copyright proprietors would wait at CBS' door." In this case, Judge Gagliardi found that "local television stations acting individually and severally would possess no such awesome power over copyright owners." 546 F. Supp. at 290. From this finding he concluded, "Since no lines would form at the doors of local television stations, no centralized machinery would arise to facilitate direct licensing." *Id.*

This reasoning escalates a characterization of the evidence in *CBS* into a minimum requirement for future cases. The plaintiffs in this case do not discharge their burden of proving that local stations cannot realistically obtain direct licenses by showing that they have less market power than CBS, " 'the giant of the world in the use of music rights,' " *CBS v. ASCAP, supra,* 400 F. Supp. at 771 (quoting testimony of a former CBS vice-president). The issue is whether the local stations have been shown to lack power sufficient to give them a realistic opportunity to secure direct licenses. To conclude that they do not simply because no one of them is as powerful as CBS disregards the functioning of a market. Sellers are induced to sell by a perception of aggregate demand, existing or capable of stimulation. The automobile manufacturers who re-

cently decided to bring back the convertible car did not await a fleet order from the nation's largest user of automobiles; they responded to the actual and anticipated consumer preferences of individual car buyers, whose individual market power is surely no greater than that of the least successful television station. Thus, it avails plaintiffs nothing to cite the testimony of Salvatore Chiantia, president of the National Music Publishers Association, that as a publisher he would not line up at the door of KID-TV in Idaho Falls to license performing rights. Brief for Appellees at 52. What is pertinent is Chiantia's point that while it would be difficult for him to have a staff that would wait at the doors of 700 television stations, "if [direct licensing] was the way I was going to get my music performed, I would have to devise a system which would make it possible for me to license." The plaintiffs have not presented evidence to show that a brokering mechanism would not handle direct licensing transactions if the stations offered to pay royalties directly to copyright proprietors.

The alleged infeasibility of direct licensing is further undermined by the acknowledged ability of the stations to secure direct licensing of music needed for their locally produced programming. Judge Gagliardi observed, "Since local television stations deal directly with the composers or copyright owners of the music contained in locally-produced programs, stations would not encounter difficulties in finding and obtaining music licenses from those composers and copyright owners." 546 F. Supp. at 289 n.37. Nevertheless, he concluded that, because local stations would be paying double for such direct licenses so long as they held a blanket license, "direct licensing would not be a realistically available alternative unless the blanket li-

cense were discarded entirely." *Id.* at 289-90 n.37. But if the stations can realistically obtain direct licenses for local programming by offering reasonable amounts of money,[9] they can avoid double payment by forgoing the blanket license. Their response is that they dare not do so because they will then be unable to secure performing rights to music on syndicated programs, which constitute the bulk of their program day. But, as we have previously noted, the availability of the program license enables them to forgo the blanket license and still obtain music rights for any program for which direct licensing proves infeasible. Alternatively, they can pursue source licensing, to which we now turn.

Source Licensing. As Judge Gagliardi noted, the "current availability and comparative efficiency of source licensing have been the focus of this lawsuit." *Id.* at 291. The availability of source licensing is significant to the inquiry as to whether the blanket license is a restraint because so much of the stations' programming consists of syndicated programs for which the producer could, if so inclined, convey music performing rights. Most of these syndicated programs use composer-for-hire music. As to such music, the producer starts out with the rights of the copyright, including the performing right, by operation of law, 17 U.S.C. § 201(b), unless the hiring agreement otherwise provides. Thus it becomes important to determine whether the stations can obtain from the producer the music performing right, along with all of the other rights in a syndicated program that are conveyed to the stations when the program is licensed. As to "inside" music, source

9. The owner of KWTX in Waco, Texas, testified that he could obtain music for nearly all his locally produced programs for $118 a month.

licensing would mean that the producer would either retain the performing right and convey it to the stations, instead of following the current practice of assigning it to the composer and a publishing company, or reacquire the performing right from the composer and publisher for conveyance to the stations. As to "outside" music, source licensing would mean that the producer would have to acquire from the copyright proprietor the performing right, in addition to the "synch" right now acquired.

Plaintiffs sought to prove that source licensing was not a realistic alternative by presenting two types of evidence: "offers" from stations and analysis of the market. Prior to bringing this lawsuit, the stations had not sought to obtain performing rights via source licensing.[10] Perhaps prompted by the evidentiary gap emphasized in our decision in *CBS-remand* or by the taunting of defendants in this litigation, plaintiffs began in mid-1980, a year and one-half after the suit was filed, to create a paper record designed to show the unavailability of source licensing.

Various techniques were used. Initially, some stations simply inserted into the standard form of licensing agreement for syndicated programs a new clause specifying that the producer has obtained music performing rights and that the station need not do so. No offer of additional compensation for the purchase of the additional rights was made. Not surprisingly most producers declined to agree to the proposed clause. A vice-president of MCA Television Limited ("MCA"), one of the major syndicators, replied

10. The stations showed no interest in source licensing even during the period from 1950 to 1972 when the "carve-out" provision of the blanket license issued by BMI permitted a station to deduct from the revenue base of the blanket fee the revenue from programs for which music performing rights were cleared at the source, whether or not clearance was accomplished by licensing from BMI.

to KAKE-TV, "It is surprising to me that the station would attach a Rider of such magnitude without previously discussing it with us. . . . [Y]ou are apparently asking us to undertake the clearance of the music performance rights in [the "Rockford Files" TV series] without offering any additional payment. . . . [W]e are unable to accept the amendment. . . . This does not mean, of course, that a different approach is unacceptable. It does, however, mean that a change of this magnitude should be discussed well in advance so that our respective concerns can be addressed."

Another approach, evidenced by King Broadcasting Co.'s letter to MCA, attached a music performing rights rider to the standard syndication licensing agreement and added, "If [*sic*] an additional fee is in order, we would certainly consider favorably any such reasonable fee." Another approach, adopted by Chronicle Broadcasting Co. in letters to various syndicators, was a request for source clearance of music performing rights with the comment, "Chronicle recognizes that this contemplated change . . . may [*sic*] in some instances require an adjustment in the basic program license fees." Metromedia, Inc., owner of several stations, went further and asked Twentieth Century-Fox Television ("Fox"), "Since you are the 'seller', what is the price you would affix to the altered product [the syndication license including music performing rights]?" In reply Fox made the entirely valid point that since syndication licensing without music performing rights had been the industry practice for years, it was Metromedia's "responsibility to advise us in what manner you

would like'' to change the current arrangements.[11] Notably absent from all of the correspondence tendered by the plaintiffs is the customary indicator of a buyer's seriousness in attempting to make a purchase—an offer of a sum of money.

Judge Gagliardi properly declined to give any probative weight to the plaintiffs' transparent effort to assemble in the midst of litigation evidence that they had seriously tried to obtain source licensing. He found ''plaintiffs' source licensing foray so darkened by the shadow of the approaching trial that its results may not be relied upon to support either side.'' 546 F. Supp. at 292. Nevertheless the District Court concluded that source licensing was not a realistic alternative because the syndicators ''have no impetus to depart from their standard practices and request and pay for television performing rights merely in order to pass them along to local stations.'' *Id.* This conclusion does not follow from some of the Court's factual findings and rests on a view of the syndication market that is contradicted by other findings.

The District Court viewed the syndication market as one in which the balance of power rests with the syndicators and the stations have no power to ''compel'' a reluctant syndicator to change to source licensing. *Id.* Yet the Court found that there are eight major syndicators, *id.* at 280 & n.13, and that they distribute only 52% of all syn-

11. Defendants take special delight in recounting the plaintiffs' evidence of an "offer" for source licensing made by Metromedia, Inc., owner of seven television stations. A lawyer representing Metromedia sent a request to a lawyer for Metromedia's production subsidiary, Metromedia Producers Corp. ("MPC"). The MPC attorney, after consultation with counsel for the plaintiffs, drafted a carefully worded rejection. The correspondence of this alleged "negotiation" was filed only in Metromedia's legal department, in a special file created for this litigation.

dicated programs, *id.* at 281, hardly typical of a non-competitive market. Moreover, the Court characterized production of syndicated programs as a "risky business," *id.* at 282, a finding fully supported by the evidence. It may be that the syndicator of a highly successful program has the upper hand in negotiating for the syndication of that program and would not engage in source licensing for music in that program simply to please any one station, but it does not follow that the market for the wide range of syndicated programs would be unresponsive to aggregate demand from stations willing to pay a reasonable price for source licensing of music performing rights.

The District Court recognized that, even under its view of a syndication market weighted in favor of the syndicators, source licensing could be said to be unavailable only if stations would not offer "premium prices." *Id.* at 292. There is no subsidiary finding as to what prices the Court thought stations would have to offer to obtain source licensing. That is not surprising in view of the failure of the plaintiffs to present evidence to show either what such prices might be or that they would be "premium" in the sense of significantly exceeding an objectively reasonable value of the rights obtained. Nor is the alleged unwillingness of the producers to undertake source licensing established by the fact that some producers own music publishing companies that receive royalties as their distributive share of the fees stations pay for the blanket license. The undisputed evidence shows that these fees are far too small to persuade syndicators to refuse to undertake source licensing in the face of reasonable offers. BMI, for example, typically distributes to a publisher between 50¢ and 85¢ for theme and background music in a half-hour episode of

a syndicated program shown on a single station; by contrast, the syndication licensing fee can exceed $60,000 for a single episode of a popular series shown in a major television market. Though some of the major producers that own music publishing companies have received more than $1 million in annual television distributions of music royalties, those royalties are a small fraction of their syndication revenue.

Defendants vigorously assert that whatever reluctance producers may have to undertake source licensing reflects their view of the efficiency of the blanket license. They contend that the blanket license may not properly be found to be a restraint simply because producers of syndicated programs regard it as efficient. We need not determine whether defendants have correctly analyzed the motivation of those syndicators who have expressed reluctance to undertake source licensing. Our task, in determining whether plaintiffs have presented evidence sufficient to support a conclusion that the blanket license is a restraint of trade, is not to psychoanalyze the sellers but to search the record for evidence that the blanket license is functioning to restrain willing buyers and sellers from negotiating for the licensing of performing rights to individual compositions at reasonable prices. Plaintiffs have simply failed to produce such evidence.

Instead they suggest that source licensing is not a realistic alternative because the agreements producers have made with composers and publishers are a "contractual labyrinth," Brief for Appellants at 53 n.73, and because the composers have precluded price competition among songs by "splitting" performing rights from "synch" rights, *id.* at 2. But plaintiffs have made no legal challenge

to the "composer-for-hire" contracts by which "inside" music is customarily obtained for syndicated programs, with provisions for producers to assign performing rights to composers and publishers. And composers have not "split" performing rights from "synch" rights; they have separately licensed distinct rights that were created by Congress. Moreover, the composers' grant of a performing rights license to ASCAP/BMI is on a non-exclusive basis. That circumstance significantly distinguishes this case from *Alden-Rochelle,* where ASCAP's acquisition of *exclusive* licenses for performing rights was held to restrain unlawfully the ability of motion picture exhibitors to obtain music performing rights directly from ASCAP's members.

The Claimed Lack of Necessity. Plaintiffs earnestly advance the argument that the blanket license, as applied to syndicated programming, should be declared unlawful for the basic reason that it is unnecessary. In their view, the blanket license is suspect because, where it is used, no price competition occurs among songs when those who need performing rights decide which songs to perform. The resulting absence of price competition, plaintiffs urge, is justifiable only in some contexts such as night clubs, live and locally produced programming of television stations, and radio stations, which make more spontaneous choices of music than do television stations.

There are two fundamental flaws in this argument. First, it has not been shown on this record that the blanket license, even as applied to syndicated television programs, is not necessary. If all the plaintiffs mean is that a judicial ban on blanket licensing for syndicated television programs would not halt performance of copyrighted music on such programs and that some arrangement for the purchase of

performing rights would replace the blanket license, we can readily agree. Most likely source licensing would become prevalent, just as it did in the context of motion pictures in the aftermath of *Alden-Rochelle*. But a licensing system may be "necessary" in the practical sense that it is far superior to other alternatives in efficiency and thereby achieves substantial savings of resources to the likely benefit of ultimate consumers, who usually end up paying whenever efficient practices are replaced with inefficient ones.

Moreover, the evidence does not establish that barring the blanket license as to syndicated programs would add any significant price competition among songs that the blanket license allegedly prevents. When syndicators today decide what music to select for their programs, they do so in the vast majority of instances, by deciding which composer to hire to compose new music for their programs. As to that "inside" music, which plaintiffs estimate accounts for 90% of music on syndicated programs, there is ample price competition: Prices paid as "up front" money in order to hire composers vary significantly. Even when syndicators consider use of pre-existing music (for which copyright protection has not expired), there is some price competition affecting the choice of that "outside" music because prices for "synch" rights vary. With this degree of price competition for music on syndicated programs already in place, it is entirely a matter of speculation whether replacement of the blanket license with source licensing would add any significant increment to price competition at the point where the syndicators decide which music to use. And since music is such a small portion of the total cost of a syndicated program to the television stations, and would

still be even if performing rights were acquired at the source and included in the total price to the station, it is also a matter of speculation whether any significant increase in price competition for music would occur when television stations decide which syndicated programs to purchase in a world of source licensing. Viewed in the context of what is known about the way music is now obtained by syndicators and the entirely speculative nature of what benefits might occur if blanket licensing were prohibited, the evidence does not show that the blanket license is unnecessary to achieve its present efficiencies.

The second flaw in the argument is more fundamental. Even if the evidence showed that most of the efficiencies of the blanket license could be achieved under source licensing, it would not follow that the blanket license thereby becomes unlawful. The blanket license is not even amenable to scrutiny under section 1 unless it is a restraint of trade. The fact that it may be in some sense "unnecessary" does not make it a restraint. This is simply a recognition of the basic proposition that the antitrust laws do not permit courts to ban all practices that some economists consider undesirable.[12] Since the blanket license restrains no one from bargaining over the purchase and sale of music performance rights, it is not a restraint unless it were proven that there are no realistically available alternatives. As we have discussed, the plaintiffs did not present evidence to establish the absence of realistic alternatives. It is therefore irrelevant whether, as plaintiffs contend, the blanket

12. The trial record reveals a sharp disagreement between respected economists as to whether the blanket licensing of music performing rights is economically beneficial or harmful. For a forceful argument that the blanket license is economically sound, *see* Sobel, *The Music Business and the Sherman Act: An Analysis of the "Economic Realities" of Blanket Licensing*, 3 Loy. L.A. Ent. L.J. 1 (1983).

license is not as useful or "necessary" in the context of syndicated programming on local television stations as it is in other contexts. Not having been proven to be a restraint, it cannot be a violation of section 1.

The blanket license has been challenged in a variety of contexts. It has been upheld for use by nightclubs and bars, *BMI* v. *Moor-Law, Inc.*, 527 F. Supp. 758 (D. Del. 1981), *aff'd mem.*, 691 F.2d 490 (3d Cir. 1982), by radio stations, *K-91, Inc.* v. *Gershwin Publishing Corp.*, 372 F.2d 1 (9th Cir. 1967), *cert. denied*, 389 U.S. 1045 (1968), and by a television network, *CBS-remand, supra.* Without doubting that the context in which the blanket license is challenged can have a significant bearing on the outcome, we hold that the local television stations have not presented evidence in this case permitting a conclusion that the blanket license is a restraint of trade in violation of section 1.

The judgment of the District Court is therefore reversed.

WINTER, *Circuit Judge*, concurring:

I disagree with little stated in Judge Newman's thoughtful and comprehensive opinion. I write separately because I believe that it demonstrates that the blanket license as presently used cannot have an anti-competitive effect and hope that his analysis, used out of context, will not lead to future needless litigation over blanket licenses in the music industry.

In *Broadcast Music, Inc.* v. *Columbia Broadcasting System*, 441 U.S. 1 (1979), the Supreme Court remanded to us to apply rule of reason analysis to ASCAP's and BMI's blanket licenses. We concluded that the blanket licenses had no anti-competitive effect with regard to the CBS network. *CBS, Inc.*, v. *ASCAP*, 620 F.2d 930 (2d Cir. 1980), *cert. denied*, 450 U.S. 970 (1981). We have now engaged in a similar analysis with regard to the broadcasters and have reached the same conclusion.

The result of this scrutiny has been to demonstrate that so long as composers or producers have no horizontal agreement among themselves to refrain from source or direct licensing and there is no other artificial barrier, such as a statute, to their use, a non-exclusive blanket license cannot restrain competition. In those circumstances, it is simply one alternative competing on the basis of price and services with others. The lack of use of the alternatives does not signal a restraint on competition but merely reflects the competitive superiority of the blanket license. So long as resort to the alternatives is not impeded by agreement among composers or producers or by some other artificial barrier, the rights and services afforded by the blanket license must be priced at a competitive level and no injury to consumers is possible.

Our scrutiny in *CBS* and in the instant case fully verifies the conclusion that blanket licenses reduce the costs of licensing copyrighted musical compositions. They eliminate costly, multiple negotiations of the various rights and provide an efficient means of monitoring the use of musical compositions. They also allow users of copyrighted music to avoid exposure to liability for copyright infringement. ASCAP and BMI blanket licenses almost invariably include not only the compositions to be used but also all others that might assert an infringement claim. The alternatives of source or direct licensing grant rights only to particular compositions and not to those with potential infringement claims. The limited number of notes on a scale creates a potential for a multitude of infringement actions, and avoiding exposure to such litigation and possible liability may be valuable indeed to users of musical compositions.

The point, however, is not that any particular efficiencies are available through blanket licensing but that such licenses will be purchased only if they are less costly than the next best alternative. Why else would producers, who generally own the musical copyrights used in their programs, choose to use ASCAP, which retains part of the revenues collected? The point is best made by comparing these blanket licenses with the arrangement struck down in *NCAA v. Board of Regents of the University of Oklahoma*, 104 S. Ct. 2948 (1984). In that case, the NCAA attempted to sell exclusive television rights to football games between member colleges. The member institutions had agreed among themselves to abide by the rules of the NCAA and to boycott collectively any institution that violated those rules. I think all would agree that, if the NCAA merely offered a *non-exclusive* license to all football games between

member schools and the member schools were free to negotiate television rights on their own, the action would have been dismissed on the pleadings. Indeed, the NCAA license would obviously enhance rather than restrict the competitive alternatives. In my view, the non-exclusive blanket licenses at issue here are indistinguishable from that hypothetical.

With these additional observations, I concur in Judge Newman's opinion.

APPENDIX B

Opinion of the District Court

BUFFALO BROADCASTING COMPANY, INC., Kid Broadcasting Corporation, KWTX Broadcasting Company, Inc., Metromedia, Inc. and Storer Broadcasting Company, On Behalf Of Themselves and All Persons or Entities Who Own Local Television Stations which Obtain Music Performance Rights Pursuant to Music License Agreements With American Society of Composers, Authors and Publishers and/or Broadcast Music, Inc.,

Plaintiffs,

v.

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, Stanley Adams, as President of American Society of Composers, Authors and Publishers, Cy Coleman, Hal David, Famous Music Corp., MCA, Inc., Morton Gould, Shapiro, Bernstein & Co., Inc., On Behalf of Themselves And All Other Members of American Society of Composers, Authors and Publishers, Broadcast Music, Inc., Al Gallico Music Corp., Paul Anka, Jerry Bock, Sheldon Harnick, Hollis Music, Inc., and Unart Music Corp., On Behalf of Themselves And All Other Affiliates of Broadcast Music, Inc.,

Defendants,

No. 78 Civ. 5670

United States District Court,
S. D. New York.

Aug. 19, 1982

Weil, Gotshal & Manges, New York City, for plaintiffs; Ira M. Millstein, James W. Quinn, R. Bruce Rich, Kenneth Steinthal, Roger B. Kaplan, Joseph Allerhand, Yvette Miller, New York City, of counsel.

Hughes, Hubbard & Reed, New York City, for defendant Broadcast Music, Inc.; Robert J. Sisk, Norman C. Kleinberg, Michael E. Salzman, Naomi F. Sheiner, Jacqueline D. Gilbert, William H. Voth, New York City, of counsel.

Skadden, Arps, Slate, Meagher & Flom, New York City, for defendants Sheldon Harnick, Al Gallico Music Corp., Hollis Music, Inc., and Unart Music Corp., et al.; Barry H. Garfinkel, Timothy A. Nelsen, New York City, of counsel.

Paul, Weiss, Rifkind, Wharton & Garrison, and Bernard Korman, New York City, for defendants ASCAP, et al.; Jay Topkins, Allan Blumstein, Fred D. Heather, Andrew J. Peck, Alan L. Fischl, Richard H. Reimer, New York City, of counsel.

OPINION

GAGLIARDI, District Judge.

The public performance of virtually every musical composition copyrighted in the United States is licensed by either the American Society of Composers, Authors and Publishers ("ASCAP") or Broadcast Music, Inc. ("BMI"). Each organization, representing thousands of individual copyright holders and music publishing companies, operates primarily through a blanket license, which provides the licensee with immediate, indemnified access to any and all songs in the organization's repertory in exchange for an annual fee ordinarily based upon a fixed percentage of the user's revenues. Recently, the Columbia

Broadcasting System, Inc. ("CBS") raised an ultimately unsuccessful challenge under the antitrust laws to the blanket licensing system of ASCAP and BMI as it applied to television networks.[1] In this action, plaintiffs challenge the legality under the antitrust laws of the practices of defendants ASCAP and BMI in licensing music performing rights to local television stations,[2] and ask the court to enjoin the blanket licensing of performing rights to local television stations in order to permit the evolution of a performing rights licensing system characterized by competition between and among composers.

I. *Factual Background*

A. *The Parties*

The five named plaintiffs in this action own and operate one or more local television stations in the United States and represent the class of all owners of local television stations in the United States who obtain music performing rights pursuant to license agreements with ASCAP and/or BMI. There are approximately 750 local television stations in the United States, owned by the approximately 450 members of the plaintiff class. The plaintiff class was certified by this court under Rule 23(b)(3), Fed. R. Civ. P.,

1. *Columbia Broadcasting System, Inc. v. American Society of Composers, Authors and Publishers,* 400 F.Supp. 737 (S.D.N.Y. 1975), *rev'd,* 562 F.2d 130 (2d Cir. 1977), *rev'd sub nom. Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.,* 441 U.S. 1, 99 S.Ct. 1551, 60 L.Ed.2d 1 (1979), *aff'd on remand,* 620 F.2d 930 (2d Cir. 1980), *cert. denied,* 450 U.S. 970, 101 S.Ct. 1491, 67 L.Ed.2d 621 (1981).

2. A "local television station" is any commercial television station licensed by the Federal Communications Commission to broadcast a television signal, excluding the fifteen television stations owned and operated by one of the three television networks.

in a memorandum decision dated December 5, 1980. Only one owner—WSM, Inc., of WSM-TV, Nashville—has opted out of the class. While 65% of the owners of local television stations own only one station, the plaintiff class also includes corporations such as Metromedia, Inc. ("Metromedia") which owns and operates seven local television stations, including WTTV in Los Angeles and WNEW-TV in New York, and Storer Broadcasting Company which also owns and operates seven local television stations. Since 1949, the vast majority of local television stations has been represented by the All-Industry Television Station Music License Committee (the "All-Industry Committee") in their periodic negotiations with ASCAP and BMI regarding music performing rights licenses.

Defendant ASCAP is an unincorporated membership association of composers, authors and publishers of music formed in 1914 by Victor Herbert and several other composers to license the performance of its members' copyrighted music. At the time of ASCAP's formation, the users of copyrighted music—principally theaters, dance halls and taverns—were so numerous and widespread, and performances so fleeting, that it was impossible for individual composers and publishers to negotiate licenses with each user and to detect unauthorized uses. In addition, users who wished to perform compositions without infringing the copyright had no practical means of obtaining licenses from the copyright owners. ASCAP was formed as a "clearinghouse" for copyright owners and users to solve these problems. *BMI v. CBS*, 441 U.S. 1, 5, 99 S.Ct. 1551, 1555, 60 L.Ed.2d 1 (1979). Today, ASCAP has approximately 21,000 writer and 8,000 publisher members and

licenses the performing rights in more than three million musical compositions to a wide variety of users including radio and television broadcasters, restaurants, nightclubs, concert halls and sports arenas. Defendant BMI is a non-profit corporation organized in 1939 by members of the radio broadcasting industry. BMI has more than 38,000 writer and 22,000 publisher affiliates, and there are approximately one million compositions in its repertory. Membership in ASCAP or affiliation with BMI is available to any composer or music publisher who meets certain minimal requirements. Both organizations' licensing practices also extend to foreign nations. ASCAP licenses on behalf of tens of thousands of members of approximately 40 affiliated foreign performing rights licensing societies who also license for ASCAP members in their countries. Similarly, BMI has reciprocal agreements with 39 foreign licensing societies pursuant to which it licenses music from their repertories in the United States and they license the works from the BMI repertory in their countries. As mentioned above, each organization operates primarily through the blanket license, which provides the licensee with the right to perform all of the compositions in the ASCAP or BMI repertory, as often as desired, upon payment of an agreed-upon fee.

The eleven individual defendants in this action represent two certified classes of defendants consisting of, respectively, all persons from whom ASCAP, and all persons from whom BMI, have obtained the right to license performing rights to third parties. Each ASCAP member and BMI affiliate enters into a standard membership or affiliate agreement by which ASCAP and BMI obtain the non-

exclusive right to license the nondramatic performance of the composer's copyrighted work. Pursuant to these agreements, ASCAP and BMI obtain the authority to establish the forms of licenses to be offered, to fix the price and manner of payment, to adopt a royalty distribution system, and to distribute royalties among the members and affiliates. After deducting operating expenses, each organization distributes all revenues to the members and affiliates at rates which reflect, among other factors, the nature and amount of the use of their music. Among the principal functions of both organizations is the monitoring and policing of unauthorized uses of their composers' copyrighted work.

As the Supreme Court commented in the *CBS* case, "both [ASCAP and BMI] plainly involve concerted action in a large and active line of commerce, and it is not surprising that, as the District Court found, '[n]either ASCAP nor BMI is a stranger to antitrust litigation.'" *BMI v. CBS,* 441 U.S. at 10, 99 S.Ct. at 1557 (quoting *CBS v. ASCAP,* 400 F. Supp. at 743). As early as 1934 the Department of Justice initiated antitrust litigation against ASCAP.[3] Following the filing in 1941 of criminal complaints which sought to enjoin ASCAP's exclusive licensing powers and to alter the blanket licensing format, the Government and ASCAP entered into a consent decree which, as modified in 1950, still largely governs ASCAP's activities.[4] Under the amended decree, ASCAP may obtain only non-exclusive rights to license its members' works

3. The action was ultimately discontinued. *See BMI v. CBS,* 441 U.S. at 10, 99 S.Ct. at 1557.

4. *United States v. ASCAP,* 1940-1943 Trade Cases ¶ 56,104 (S.D.N.Y. 1941).

for public performances.[5] Further, the decree requires ASCAP to offer a "per program" license which differs from the traditional blanket license in that its fee is based on the licensee's revenues only for those programs which actually use the copyrighted music. The decree mandates that ASCAP set its fees for these licenses at rates which offer users a genuine choice between the licenses, prohibits ASCAP from insisting on the blanket license, and establishes a procedure whereby a licensee unable to agree upon a fee with ASCAP may apply to the District Court for the Southern District of New York for determination of a "reasonable fee."[6] The licensing practices of BMI

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5. The amended decree provides in relevant part:

IV. Defendant ASCAP is hereby enjoined and restrained from:

(A) Holding, acquiring, licensing, enforcing, or negotiating concerning any rights in copyrighted musical compositions other than rights of public performance on a nonexclusive basis;

(B) Limiting, restricting, or interfering with the right of any member to issue to a user nonexclusive licenses for rights of public performance.

6. The amended decree states in relevant part that ASCAP is:

(B) Ordered and directed to issue to any unlicensed radio or television broadcaster, upon written request, per program licenses, the fee for which

(1) in the case of commercial programs, is, at the option of ASCAP, either (a) expressed in terms of dollars, requiring the payment of a specified amount for each program in which compositions in the ASCAP repertory shall be performed, or (b) based upon the payment of a percentage of the sum paid by the sponsor of such program for the use of the broadcasting or telecasting facilities of such radio or television broadcaster,

(2) in the case of sustaining programs, is at the option of ASCAP, either (a) expressed in terms of dollars, requiring the payment of a specified amount for each program in which compositions in the ASCAP repertory shall be performed, or (b) based upon the payment of a percentage of the card rate which

(footnote continued on next page)

parallel those of ASCAP and are similarly governed by a consent decree entered into in 1966 between BMI and the Government.

B. *Local Television Station Programming*

There are approximately 750 local television stations currently in operation; of these, approximately 600 are net-

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would have been applicable for the use of its broadcasting facilities in connection with such program if it had been commercial, and

(3) subject to the other provisions of Section VIII, takes into consideration the economic requirements and situation of those stations having relatively few commercial announcements and a relatively greater percentage of sustaining programs, with the objective that such stations shall have a genuine economic choice between per program and blanket licenses;

(C) Enjoined and restrained from requiring or influencing the prospective licensee to negotiate for a blanket license prior to negotiating for a per program license.

VIII. Defendant ASCAP, in fixing its fees for the licensing of compositions in the ASCAP repertory, is hereby ordered and directed to use its best efforts to avoid any discrimination among the respective fees fixed for the various types of licenses which would deprive the licensees or prospective licensees of a genuine choice from among such various types of licenses.

IX. (A) Defendant ASCAP shall, upon receipt of a written application for a license for the right of public performance of any, some or all of the compositions in the ASCAP repertory, advise the applicant in writing of the fee which it deems reasonable for the license requested. If the parties are unable to agree upon a reasonable fee within sixty (60) days from the date when such application is received by ASCAP, the applicant therefor may forthwith apply to this Court for the determination of a reasonable fee and ASCAP shall, upon receipt of notice of the filing of such application, promptly give notice thereof to the Attorney General. In any such proceeding the burden of proof shall be on ASCAP to establish the reasonableness of the fee requested by it. Pending the completion of any such negotiations or proceedings, the applicant shall have the right to use any, some or all of the compositions in the ASCAP repertory to which its application pertains, without payment of any fee or other compensation, but subject to the provisions of Sub-section (B) hereof, and to the final order or judgment entered by this Court in such proceeding . . . .

work-affiliated and the others are independent.[7] Local television stations, whether network-affiliated or independent, have three principal sources of programming: network programming; syndicated programming; and locally-produced programming. Network programming is not at issue in this action and need not be discussed.[8]

Syndicated programming is defined as theatrical motion pictures, pre-recorded television programs and live television programs offered by producers and distributors for sale or license to a television station to be broadcast as a non-network program. Syndicated programs include made-for-television movies, series, cartoons, documentaries, news, sports and religious programs. Local television stations exercise no control over any of the creative elements of the production of syndicated programming. Although there is wide variation, syndicated programming typically comprises approximately 65-75% of the total non-network programming of local television stations. The bulk of syndicated programming is comprised of off-network programming, that is, pre-recorded programs previously broadcast on network television, and of motion pictures originally distributed theatrically. The remainder, or approximately 35%, is produced originally for syndication, and is known as first-run syndicated programming. The percentage of first-run programs varies widely among local television stations, ranging from 13% for one station

7. As is well-known, there are three national television networks owned by CBS, the National Broadcasting Company, Inc. and the American Broadcasting Companies, Inc. Each owns and operates five television stations in five of the top fifteen television markets in the United States and has 200 affiliated local stations which use network programming for a substantial portion of their broadcast day.

8. *See* note 16 *infra*.

(KPHO) to 85.9% for another station (WGAL). First-run syndicated programming has increased in importance in recent years; in 1981, first-run programs accounted for 43% of the 200 leading syndicated programs. Most local television stations own inventories of syndicated programs for which they own the broadcast rights. It was clearly established at trial that the broadcast of syndicated programming is essential to the successful and profitable operation of virtually all local television stations.

Locally-produced programming on the average occupies two to three hours of the local station broadcast day and typically consists of news shows, sports coverage and talk shows. There is, again, a wide variety in the amount of broadcast time devoted to locally-produced programming and in the contents of such programming. Each local station also broadcasts thousands of locally-originated commercials per year, of which substantial numbers are produced by the stations themselves.

From the early years of television through the 1950's, programming was predominantly "live." Since the mid-1960's, the vast majority of local television stations' programming has been pre-recorded.[9]

C. *The Distribution of Syndicated Programming*

Local television stations fill their syndicated programming needs from programs offered by syndicators (that is, both television producers and distributors). A critical issue in this action is whether it is the syndicator or the local television station that holds the bargaining power

9. Defendants emphasize that, spurred by the increased use by syndicators of satellite distribution, in recent years there has been an increase in the number of syndicated programs broadcast live or on the same day they are produced. The amount of such programming remains insignificant.

when syndicated programming is offered for sale or license in a given television market. There are hundreds of syndicators and thousands of syndicated programs available for purchase by local stations. A relatively small percentage of these programs, however, has had network runs sufficiently successful to make them attractive properties. Further, there is but a limited number of programs that have not had network runs which possess the recognized potential for popularity within a given market. Competition among local television stations for these "hot" properties is active. In most television markets there are three Very High Frequency ("VHF") local stations.[10] Syndicators frequently commence negotiations simultaneously with all local television stations in a particular market and there is always the possibility that, if the syndicator is unable to obtain its asking price in that market, it will bypass the market entirely. That threat may be particularly powerful in the smaller markets where distributors derive little revenue in any event. Although it is altogether unlikely that a syndicator would bypass one of the leading television markets, active competition among the television stations in the leading markets is maintained by the usually greater number of television stations in those markets. Thus, the court concludes on the basis of the credible testimony of several representatives of the local television stations that, despite the large number of syndicators and

10. Defendants stress that, due to the FCC's Prime Time Access Rule barring network stations from broadcasting off-network syndicated programs during prime time, even in New York, the nation's largest television market, there are only three VHF local commercial stations competing for syndicated programs to be shown during prime time. The existence of three potential buyers competing at any given time for a single product does not, to this court's view, undermine the finding below that competition among local stations for desirable syndicated programming is "vigorous."

syndicated programming available to local stations, competition within each television market for the desirable programs on whose acquisition the viability of most local stations depends is vigorous.[11] The court further finds—and this is implicit in the preceding conclusion—that a single local television station usually has little leverage when negotiating with the syndicator of a desirable program.[12]

The evidence also establishes that the distribution market of syndicated programs is concentrated on eight leading companies.[13] In 1981 these companies distributed 52% of all syndicated programs (not including motion pictures produced initially for theatrical exihibition) and 82% of the off-network syndicated programs. The broadcast of some of the syndicated programming distributed by these companies is essential to the successful, profitable opera-

11. This testimony was provided by: Lesley G. Arries of Buffalo Broadcasting Co., Inc.; James A. Stabile and Alfred L. Schwartz of Metromedia; Milford N. (Buddy) Bostick of KWTX-TV in Waco, Texas; Abiah A. Church of Storer Broadcasting Co.; J. Allen Jensen of KID-TV in Idaho; and George Willoughby of King Broadcasting Co. in Seattle. Defendants did not, in order to rebut the testimony, produce as witnesses at trial any of those syndicators who defendants assert deal with local television stations from weak bargaining positions.

12. The court is cognizant of the fact that, as defendants emphasize, many owners of local television stations own stations in more than one market. That fact does not alter the court's conclusion that local television stations lack bargaining power over distributors of desirable syndicated programming for the reason that individual stations, even though commonly owned, do not generally engage in "group buying" of syndicated programs.

13. These companies are: Viacom Enterprises, MCA/Universal, Columbia Pictures Television, Paramount Television Distribution, Warner Bros. Television Distribution, United Artists Television, Inc., Twentieth-Century Fox Television and MGM Television. These eight companies also control a sizable but smaller proportion of the production market of syndicated programming.

tion of most local television stations. This concentration in the distribution market lends additional support to the conclusion that, within each television market, the distributor is often in a powerful bargaining position vis-a-vis the local television station seeking to purchase syndicated programming, particularly with regard to desirable off-network programs.

D. *Local Television Stations' Use of Music*

The use of music in local television station broadcasts may be categorized as either feature, theme or background. Feature music is music which is the principal focus of audience attention, *e.g.*, a song sung by a performer on camera. Theme music is music used either to introduce and/or close a program or as part of a program. Background music is music used to complement action on the screen. Virtually all programs broadcast on local television stations make some use of music and the predominant portion of that music use consists of background and theme music. While the composition of background music may often require great expertise and may significantly contribute to the overall entertainment value of a program, such music is usually interchangeable.

The vastly predominant portion of music contained in local television stations' non-network programming is found in the stations' syndicated programming. Virtually all syndicated programs broadcast by local television stations contain theme or background music, the substantial majority of which is in the ASCAP or BMI repertory. A smaller but sizable portion of the stations' syndicated pro-

gramming also contains feature music.[14] Producers control the selection or acquisition of the music contained in syndicated programs; local television stations have no input. The music recorded in syndicated programming is permanently integrated therein and the programs cannot be broadcast without automatically performing the music. A small but increasing portion of the syndicated programming broadcast domestically is produced in foreign nations. Most of the music contained in such programming is licensed by ASCAP and BMI.

Virtually all locally-produced programs contain theme music, some contain background music, and few contain feature music.[15] In contrast to their lack of control over syndicated programming, local stations have the ability to control music use in most of their locally-produced programs. To fill their music needs for local programming, local stations may acquire music from music production companies, music libraries, or background music services. The overwhelming majority of locally-originated commercials use theme or background music, the predominant portion of which is copyrighted and in the ASCAP or BMI repertory. The evidence established that music is decidedly less important to the overall entertainment value of most locally-produced programs than it is to the success of most syndicated programming. Nevertheless, local stations freely select music from the ASCAP and BMI repertories for their locally-produced programs because their blanket licenses permit them to do so without additional costs.

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14. Defendants assert that the number of first-run syndicated programs being broadcast which regularly contain substantial amounts of feature music has increased since 1971. The increase does not yet appear significant.

15. Exceptions include live local concerts, parades, football games and ethnic or religious programs.

E. *The Music Rights Licensing System*

To the extent that local television stations use copyrighted musical compositions, performing rights licenses permitting the broadcast of such music must be obtained in order to avoid copyright infringement. In order to cover the performance of ASCAP and BMI music contained in their non-network programming,[16] all of the named plaintiffs and almost all other commercial television stations have entered into blanket license agreements with both ASCAP and BMI. Given the prevalence of both ASCAP and BMI music in the stations' syndicated programming, local television stations have been obligated to obtain performing rights licenses from both organizations. There is no evidence whatsoever that ASCAP and BMI compete against each other in the licensing of television performing rights to local stations.[17] By virtue of the blanket licenses obtained from ASCAP and BMI, local television stations are able to perform virtually all music copyrighted in the United States and elsewhere in the world without danger of infringement. Under the blanket license agreements entered into between ASCAP and BMI and the local television stations, the fees to be paid by each station historically have been computed as a percentage of the station's revenues less certain agreed-upon deductions. The blanket licenses currently offered by both organizations specifically

16. Music in the *network* programming broadcast by local television stations is covered by blanket licenses obtained by the networks from ASCAP and BMI and is paid for directly to the networks by local stations. Thus, the individual local television stations do not need to obtain additional music licenses in order to broadcast network programming.

17. There does exist a third performing rights organization in the United States, SESAC, Inc. ("SESAC"), which also issues blanket licenses to many local television stations. SESAC's repertory is insignificant compared to that of either ASCAP or BMI.

provide that a local station may not exclude from its revenue base, for the purpose of determining its license fees, income derived from a program which contains music cleared "at the source"[18] by the program producer, unless the license at the source was issued by ASCAP or BMI. The fees payable by the local stations to ASCAP and BMI do not vary either according to the significance, quality and value of any music used in a particular program or according to the extent to which music in the ASCAP or BMI repertory is actually used.[19]

As mentioned above, pursuant to their respective consent decrees, ASCAP and BMI also offer per program licenses which permit local stations to perform any or all of the compositions in the organizations' repertories in exchange for a fee based on a percentage of the stations' revenues derived from the programs which contain ASCAP or BMI music. Under the per program license, local television stations do not pay fees for those programs whose music is cleared at the source. Currently, of the 750 local television stations, none holds a per program license with ASCAP and only two hold BMI per program licenses. The two principal reasons that the per program license is an unattractive alternative to the blanket license are : (1) its base percentage is several times higher than the percentage

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18. Licensing "at the source" (or "source licensing") refers to the practice by which producers themselves obtain the performing rights to the music contained in their programs and then pass along these rights together with the program packages to television stations (usually via distributors). Music may be licensed at the source by producers in either composer-for-hire or pre-existing music situations.

19. The amount which local television stations pay ASCAP and BMI for their blanket licenses, although substantial, is but a small fraction of the stations' revenues. In 1980, local television stations paid $36.7 million in fees to ASCAP and $20.1 million to BMI. The networks, by contrast, in 1980 paid $15.2 million to ASCAP, and $7.8 million to BMI.

rate payable under the blanket license; and (2) its reporting provisions are onerous, requiring local television stations to report music use in all non-network programming whether or not ASCAP or BMI music is contained therein.

Though not party to this lawsuit, the syndicated program producers, who are engaged in the risky business of program production, have a pivotal role in the system under attack. These producers are the only persons in a position to determine the musical needs of each program and to negotiate over the price of music prior to its selection. Producers obtain music for their programs by two means: (1) by engaging a composer-for-hire to write original music; and/or (2) by obtaining a license from a music publisher or its agent (usually the Harry Fox Agency) for the right to use desired pre-existing compositions. The cost of obtaining music is typically 2% or less of the total production costs of a given program.

Most of the music contained in syndicated programs is created by composers engaged by the producers to compose music specifically for the programs. The ASCAP member or BMI affiliate hired to compose music for a program negotiates with the producer over the price of all rights to the music, with the exception of television performing rights. Principal among the rights that are negotiated is the "synchronization right," which is defined as the right to record or reproduce a copyrighted musical composition in timed relation or synchronization with the visual or other aural aspects of any program or work.[20] With re-

20. The Copyright Act of 1976, 17 U.S.C. § 101 *et seq.*, recognizes the synchronization right as a distinct right exclusively exploitable by the copyright holder. Whereas a performing rights license is required each time a user, such as a local station, broadcasts a program in which copyrighted music is incorporated, a synchronization license is a one-time only license. Television synchronization license fees are usually between $150 and $500.

spect to television performing rights, producers and composers typically agree that the composer is entitled to receive the writer's share of any performing rights royalties distributed by ASCAP or BMI, and that the publisher's share of such royalties shall be distributed to a music publisher of the producer's choice which is a member or affiliate of the composer's performing rights society, and which may be, and usually is, a subsidiary of or a company affiliated with the producer. Ultimately, the right to license the television performance of the composer's music passes to the composer's publisher and either ASCAP or BMI, but does not pass to the producer.[21] The purpose and effect of this practice—which is the focal point of plaintiffs' attack—is to "split" the licensing of television performing rights from the licensing of all other rights in the music

21. Under these composer-for-hire agreements, producers obtain television performing rights under the condition that the producers register the music with ASCAP or BMI publishing subsidiaries and then grant back a portion of the performing rights to the composers, all pursuant to the understanding that the producers will not assign the television performing rights in any manner which would abrogate or otherwise affect the composers' right to collect the writers' shares of the performing rights royalties to be distributed by ASCAP and BMI. The provisions outlined above reflect several elements of the industry-wide agreements negotiated in the 1960's between the Composers and Lyricists Guild of America and the Association of Motion Picture and Television Producers. Defendants assert that producers somehow emerge from this contractual labyrinth with the ability to license music performing rights directly to anyone. It is nonetheless clear that producers possess no such capacity (unless the capacity to which defendants refer is that of the producers' affiliated publishing interests to license the music directly to television stations). It was apparent throughout four weeks of testimony regarding the industry that under the present system there is no source licensing and that syndicators could not merely convey performing rights without engaging in any additional negotiations with composers or publishing companies. If further substantiation is needed, it is provided by the responses of syndicators to plaintiffs' requests for source licensing in which several syndicators stated that to fulfill plaintiffs' requests they would have to return to the publishers and composers and enter into new negotiations in order to secure television performing rights.

performed. While the price of all other music rights is negotiated directly between the composer and the producer and the rights are then granted to the producer who, in turn, passes the rights along with the program to the television station, television performing rights are licensed to the television station separately through ASCAP and BMI blanket licenses. This practice of splitting the licensing of television performing rights from the licensing of all other music rights excludes the licensing of these performing rights from the negotiations between composers and producers regarding the licensing of all other music rights and, to that extent, insulates composers from the price competition between and among composers that underlies those negotiations.[22] This insulation of the licensing of performing rights from the price competition that bears directly upon the licensing of other rights takes place in a "buyers' market" in which there are currently numerous composers available to create theme and background music for syndicated television programs from among whom a producer may select. While the blanket licensing system insulates the licensing of performing rights from price competition between and among composers, it does not diminish competitiveness in the licensing of other music rights.

In those instances in which a producer of a pre-recorded program desires to use pre-existing copyrighted music, the producer negotiates for and obtains synchronization rights in such music in direct dealings with the copyright holder or his agent. In most such circumstances, the producer

22. Should producers and composers negotiate with regard to the licensing of television performing rights in addition to the other rights, there would be little, if any, added complexity to these composer-for-hire negotiations.

deals with the music publisher or the Harry Fox Agency, an organization which is operated by the National Music Publishers Association and which acts as an agent for about 3,500 music publishers. As with composer-for-hire transactions, in pre-existing music transactions the publisher (or the Harry Fox Agency) does not grant, and the producer does not obtain, licenses covering television performing rights.[23] Equally, while the licensing of synchronization rights in pre-existing music is characterized by price competition, there is no price competition between and among copyright holders with respect to the licensing of television performing rights in such music. By contrast, when the producer of a theatrical motion picture wishes to use pre-existing music, the producer negotiates for and obtains *both* synchronization and theatrical performing rights from the publisher or the Harry Fox Agency.[24] As with his syndicated television program producer counterpart, however, the theatrical motion picture producer is not granted television performing rights licenses for the music contained in his picture.

Plaintiffs also introduced evidence regarding the vested interests of the leading syndicators and publishers in the current licensing system. First, as mentioned above, many syndicators or their affiliates, including the eight major distributors previously discussed, typically own interests

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23. The publisher in this situation is analogous to the composer in the composer-for-hire situation; there appears to be no question that the publisher could, should he be so requested and so inclined, grant a performing rights license to the producer.

24. The reason for the absence of "splitting" in the licensing of music in theatrical motion pictures is that the practice was held unlawful under Sections 1 and 2 of the Sherman Act in *Alden-Rochelle, Inc. v. ASCAP*, 80 F.Supp. 888 (S.D.N.Y. 1948), *relief*, 80 F.Supp. 900 (S.D.N.Y. 1948).

in one or more music publishing companies which are members of ASCAP or affiliates of BMI. The revenues which these leading syndicators receive from ASCAP and BMI royalties through their affiliated publishing interests are a tiny fraction of what they receive from syndication of their programs.[25] Second, the evidence clearly establishes that only a handful of leading composers secures the bulk of the benefits of the blanket licensing system. In 1979, only 13% of all ASCAP and BMI publishers received any television distributions and less than .8% received more than 75% of all ASCAP and BMI television performance royalties.[26]

II. *Discussion*

A. *Introduction*

Having set forth at length the context in which this action arises, the court turns to the claims of the parties and the legal standard applicable thereto. Plaintiffs claim that the blanket licensing system as it applies to local television stations constitutes an anticompetitive restraint of trade in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1,[27]

25. The court is unable, on the basis of the disputed facts and figures presented, further to specify the extent of the producers' and distributors' affiliated interests in ASCAP and BMI.

26. There is, of course, no indication that it is because of the blanket licensing system that only a few composers earn royalties attributable to performance of their compositions on local television station broadcasts. It may well be that in a source licensing system featured by price competition among composers these same composers would control the market.

27. That section provides in relevant part: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. . . ."

and misuse of copyright in violation of the Copyright Act of 1976, 17 U.S.C. § 101 *et seq.*[28] The relief plaintiffs seek is an injunction precluding defendants ASCAP and BMI from offering blanket music performing licenses to local television stations and a declaration that defendants' licensing practices constitute misuse of copyright.[29] Plaintiffs argue that the licensing of television performing rights through blanket licenses is needless, anomalous, inefficient and coercive. To plaintiffs, the salient feature of defendants' blanket licensing system is the splitting of the licensing of television performing rights from the licensing of all other music rights at the source and the consequent absence of price competition between and among musical compositions. Plaintiffs further contend that the very existence of the blanket license and the realities of the market prohibit them from securing by self-help a reasonable alternative. The "brave new world" envisioned by plaintiffs is one in which, the blanket license having been enjoined, local television stations obtain music performing rights, as they now do all other music rights, from syndicators who have obtained licenses at the source from composers and publishers. As for locally-produced programming, plaintiffs seek the opportunity to secure music performing rights directly from

28. Plaintiffs' claim of copyright misuse is tangential to the focal antitrust claim and is mentioned only briefly below. *See* note 45 *infra*. The complaint also asserts claims that defendants monopolized the market for the licensing of performing rights to local television stations in violation of Section 2 of the Sherman Act, 15 U.S.C. § 2, and that the blanket licensing system constitutes an illegal tying arrangement in violation of Section 1. These claims were unmentioned both during the four-week trial and in the parties' very extensive pre-trial and post-trial papers. The court accordingly regards the claims as abandoned and shall not consider them.

29. The complaint additionally seeks treble damages. In this bifurcated trial, the issue of liability was tried first with the issue of damages reserved pending decision on the issue of liability.

copyright holders. Defendants' position is that this action is the off-network rerun of *CBS*, and as such must be dismissed. Defendants dispute each of plaintiffs' premises, contentions and conclusions, and maintain that the blanket licensing system, freely-chosen and highly efficient, is neither a restraint of trade nor anticompetitive. To defendants, the distinguishing feature of the blanket license is not the absence of price competition, which defendants dispute in any event, but rather the undeniable advantages of the system for both users and copyright owners.

CBS is, of course, the controlling precedent. At issue in *CBS* was the legality under the antitrust laws of the blanket license as applied to television networks. In the first phase of the lawsuit, the district court dismissed CBS' complaint, holding that the blanket license did not restrain trade due to the availability of an alternative, namely, direct licensing.[30] *CBS v. ASCAP*, 400 F. Supp. 737. The district court found that in view of CBS' enormous market power,[31] should CBS request music licenses directly, "copyright owners would line up at CBS' door," 400 F. Supp. at 768, and that CBS had failed to prove that there were unreasonable barriers to the transition from blanket licensing to direct licensing. On appeal, the decision of the district court was reversed by the Second Circuit, which held the blanket licensing system to be price-fixing unjustified by market necessity, a *per se* violation of the Sherman Act, and re-

30. It appears that by the term "direct licensing" the district court meant both direct and source licensing as defined in this opinion. *See* 400 F.Supp. at 759-60, 768, 778.

31. As the district court stated: "CBS is far more than a television network. It is, as Michael Dann, former Senior Vice President of CBS in charge of programming testified, 'The No. 1 outlet in the history of entertainment' and 'the giant of the world in the use of music rights.'" 400 F.Supp. at 770.

manded with instructions to fashion a remedy that would preserve the blanket license in some situations. *CBS v. ASCAP,* 562 F.2d 130. The Supreme Court reversed the decision of the Second Circuit and remanded for reconsideration of the blanket licensing system under the rule of reason. *BMI v. CBS,* 441 U.S. 1, 99 S.Ct. 1551, 60 L.Ed.2d 1. Rejecting the Second Circuit's strict *per se* approach, the Supreme Court emphasized the benefits of the blanket license, such as transaction costs savings, monitoring costs savings, unrestrained output, flexibility in the choice of musical material, and indemnification for users from liability for copyright infringement. On remand, the Second Circuit ruled that the blanket licensing system as it applied to CBS did not restrain competition and affirmed the district court's decision denying relief. *CBS v. ASCAP,* 620 F.2d 930 (2d Cir. 1980), *cert. denied,* 450 U.S. 970, 101 S.Ct. 1491, 67 L.Ed.2d 621 (1981).

Under the rule of reason standard set forth by the Second Circuit, the court must conduct a two-part inquiry. The first issue is whether the blanket licensing system actually restrains competition in any way. Even though under the blanket license there may be no price competition among musical compositions, if potential competition exists outside the blanket license then it is customer preference, not defendants' practices, that causes the lack of competition. That is, if the blanket license has been chosen by users "in preference to realistically available marketing alternatives," 620 F.2d at 935, then it cannot be found that the blanket license itself has any impact on competition. Thus, the first issue specifically is whether there now exist realistically available alternatives to the blanket licensing of music performing rights to local television stations. The

second issue, should it be found that plaintiffs have no realistically available alternative to the blanket license, is whether on balance the blanket licensing system's anti-competitive effects outweigh its pro-competitive effects. 620 F.2d at 934. Plaintiffs bear the burden of proof with regard to both issues. *CBS v. ASCAP*, 400 F. Supp. at 751; *see also CBS v. ASCAP*, 620 F.2d at 937.

B. *Are There Realistically Available Alternatives?*

A threshold matter, crucial to the outcome of this issue, is the meaning of "realistically available." Plaintiffs' position is that an alternative is realistically available only if it is efficient and available immediately. Defendants offer as realistically available any alternative that is mechanically feasible regardless of time and expense. The court's definition lies between either extreme, but is closer to that proposed by plaintiffs. In considering the matter, three questions arise. The first question is how costly or inefficient a feasible alternative may be and still be realistically available. A "realistically available" alternative must, of course, be other than a merely "available" alternative. Within the class of available marketing alternatives, the sub-class of realistically available marketing alternatives should, by the plain meaning of words, exclude those alternatives so costly or inefficient as to be impractical and unappealing to any user choosing freely. The Second Circuit provides a clue in its *CBS* decision when it states: "An antitrust plaintiff is not obliged to pursue any imaginable alternative, *regardless of cost or efficiency*, before it can complain that a practice has restrained competition." 620 F.2d at 936 (emphasis added). The court thus concludes that a realistically available marketing alternative is one

that is reasonably efficient and not unreasonably costly.[32] A second question is how much time may the transition to an alternative entail consistent with it being realistically available. Guidance is provided by *CBS*, where the Second Circuit found direct licensing realistically available although the changeover could take up to one year. 620 F.2d at 937-38; *see also* 400 F. Supp. at 759. Plaintiffs could not therefore offer as evidence of the non-availability of an alternative the resistance of producers or publishers to a suggestion that licensing practices be altered immediately. Where, however, the necessary machinery is already functioning, a reasonable changeover need not be lengthy and the probative value to plaintiffs of spurned invitations to change would not be vitiated by the immediacy of the demand. The third question is, in determining whether an alternative is realistically available, how many local television stations must the court postulate will seek to effect the transition to that alternative. It is conceded that by acting in concert

32. Recently, in *F.E.L. Publications, Ltd. v. Catholic Bishop of Chicago*, 1982-1 Trade Cas. ¶ 64,632 (7th Cir. March 25, 1982), the Seventh Circuit adopted a standard of availability which appears similar to that advanced here. In rejecting a challenge to the blanket license offered by a single publisher of religious music to Roman Catholic parishes in the Chicago area due to the availability of marketing alternatives, the Court of Appeals stated: "Although inconvenience or expense may in some cases be barriers to the availability of alternatives, in this case we believe these factors are not so obstructive that they constitute legal impediments to [the] alternatives." *Id.* at 73,466. Specifically, the Seventh Circuit held that an alternative license offered by the same publisher was a realistically available and adequate alternative despite the fact that, unlike the challenged blanket license, the alternative would permit a church to use each song only one time and thus prohibit inclusion in custom-made hymnals. To the extent that the holding in *F.E.L. Publications* is inconsistent with the standard advanced here, the court finds *F.E.L. Publications* distinguishable by virtue of the fact that, in sharp contrast to the instant case, at issue there were the licensing practices of a *single* publisher in a comparatively miniscule market with substantially reduced capacity to offer licensing alternatives.

local stations would risk antitrust liability, and the availability of an alternative should all local stations unite and demand a change is not at issue. Nor would it be appropriate, as plaintiffs appear to suggest, to consider the availability of an alternative should only one local station pursue negotiations, because the evidence indicates that, were stations left to their own devices, more than one station would seek source licensing. Rather, the court must assume that several or many local stations acting individually would demand alternative licensing and must consider the present availability of alternatives in that context.

1. *Historical Background*

Before considering the realistic availability *vel non* of each of the three principal alternatives to the blanket licensing system, the court considers briefly whether, historically, the blanket license was freely chosen by local television stations. The inquiry will not in any event answer whether the blanket license today is realistically available and freely chosen by the local stations because conditions and attitudes may have changed. Nevertheless, the inquiry may shed light on the underlying issue.

Contrary to defendants' assertions that local television stations have eagerly sought blanket licenses, the history of the negotiations between the parties indicates that local television stations have only acquiesced in the development and maintenance of the blanket licensing system. The first blanket license for television performing rights was offered in 1941, while the television industry was still in its infancy. Indicative of the state of the industry at the time, the first license was gratuitous. In 1948 ASCAP cancelled the 1941 license and notified the television industry of its intent to

negotiate fees for music performing rights. One important element of the ensuing negotiations was the proposal by the television stations that the *Alden-Rochelle* doctrine[33] be extended to the broadcast of motion pictures on television. The attempt was unsuccessful and the television stations ultimately agreed to a blanket license without any carve-out provision for motion pictures licensed at the source. Dissatisfied with the results of the 1948 negotiations, which were conducted principally by the networks, the local stations formed the All Industry Committee in 1949 to act as a collective bargaining representative in negotiations with ASCAP and BMI. In 1950, as discussed above, ASCAP and the Department of Justice entered into a consent decree which largely governs the actions of ASCAP today. Pursuant to the consent decree, in 1951 the All Industry Committee commenced an action known as the *Voice of Alabama* proceeding[34] in an effort to secure lower license rates, particularly in connection with the per program license. The action was settled in 1954.

In 1961, upon expiration of the previous license term, the All Industry Committee sought to negotiate with ASCAP a new form of license that would exclude from its coverage non-locally produced pre-recorded programs in order to allow for the development of source licensing for those programs. When the negotiations proved unsuccessful, the local stations commenced a second action pursuant to the consent decree, known as the *Shenandoah* proceeding, for an order directing ASCAP to issue the requested license. The district court dismissed the petition in 1962 and the

33. *See* note 24 and accompanying text *supra*.

34. *United States v. ASCAP (Application of Voice of Alabama, Inc.)*.

Second Circuit affirmed in 1964.[35] The *Shenandoah* proceeding was not ultimately terminated until 1969, when the district court entered an order, on consent of the parties, which preserved the blanket license intact. The local television stations subsequently agreed upon extensions of the blanket license with both ASCAP and BMI through 1978. The instant action was commenced on November 28, 1978.

In the court's view, this brief survey demonstrates that, historically, the blanket license was not actively sought by local television stations. Rather, the blanket license was usually agreed to as a necessary compromise and its reign was punctuated by periodic litigation. The history of the parties' negotiations must also be viewed within the context of changing conditions. Through the late 1950's, most television programming was live. Given the concededly greater benefits the blanket license offers to broadcasters of live programming, it follows that during the 1940's and 1950's when the blanket license became an institution local stations had less incentive than now to seek an alternative form of licensing. Nevertheless, alternatives were sought even then. In sum, the history of the parties' negotiations offers no support to defendants' contention that the present licensing system has been created by plaintiffs and that the blanket license has been and is freely chosen among realistically available alternatives. In fact, the historical evidence is to the contrary.

2. *The Per Program License*

There is no question that the per program license is feasible and available. As discussed above, its availability

35. *United States v. ASCAP (Application of Shenandoah Valley Broadcasting, Inc.)*, 331 F.2d 117 (2d Cir.), *cert. denied*, 377 U.S. 997, 84 S.Ct. 1917, 12 L.Ed.2d 1048 (1964).

is mandated by the 1950 consent decree and there are two stations that hold BMI per program licenses. There are also 748 stations that have not chosen the per program license. The question before the court is whether the per program license has been a realistic alternative to those 748 stations that use the blanket license.

The per program license is a variant of the blanket license, the principal difference being that fees for the per program license are charged only for those programs containing copyrighted music. Programs containing music licensed at the source are also not charged. Like the blanket license, the per program license permits access to any song in the organization's repertory and reduces transaction costs. Equally, under the per program license there is no direct price competition between and among composers and compositions. Unlike the blanket license, the per program license saddles users with onerous reporting obligations. In addition, per program rates are seven times higher than those payable under th blanket license. For these reasons, only two of 750 stations have chosen the per program license.

Defendants maintain that comparisons demonstrate the superiority of the blanket license, not the deficiencies of the per program license. The court does not agree. Though feasible and available, the per program license has never been a viable alternative for local television stations. The record before the court reveals that the cost and burden of the per program license's record-keeping and reporting requirements render the license an alternative that more than 99.7% of all local television stations do not consider seriously. Each of the economists that testified at trial stated that given its recording and reporting requirements the per

program license is a costly and inefficient alternative. This testimony was substantiated by the local station representatives. Further, it appears that throughout the parties' negotiations neither side regarded the per program license as offering a genuine economic choice. It is a stipulated fact that the *Voice of Alabama* proceeding was settled in 1954 on the express understanding that few stations would select the per program license. Under these circumstances, the per program license does not, as defendants argue, become a realistically available alternative merely by virtue of the fact that local stations can initiate litigation under the 1950 consent decrees concerning the terms of the license. Even were the rates lowered by resort to litigation under the consent decree, the court is unaware of how the burdensome record-keeping and reporting requirements could be significantly altered. Though the consent decree seeks to guarantee that users will have a "genuine economic choice" between the blanket and per program licenses, the trial testimony revealed that the guarantee is not meaningful in the marketplace. The court therefore concludes that the per program license is too costly and burdensome to be a realistic alternative to the blanket license.[36]

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36. The court's conclusion with regard to the per program license is not at odds with that of the district court in *CBS v. ASCAP*, 400 F.Supp. at 778-79. The court in *CBS* cited the per program license as a feasible changeover mechanism in view of (1) the per program license's carve-out provision for programs containing only music licensed at the source, and (2) CBS' concession "that it could license the music for most of its entertainment programs without difficulty by requiring the program packager to deliver performance rights together with the rest of the package." 400 F.Supp. at 778. As discussed below, the major distinction between this case and *CBS* is that local stations do not have the market power or resources to compel source or direct licensing. The district court's finding in *CBS* that the per program license was available as a transitional device is therefore dis-

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3. *Direct Licensing*

Direct licensing is the system by which television stations, having obtained a syndicated program or having themselves produced a program, directly contact each composer or agent or publisher that owns the television performing rights to the music contained in the program in order to obtain the music rights without the need of a blanket license from ASCAP or BMI. Plaintiffs contend that direct licensing is not a realistically available alternative to the blanket license with respect to the music contained in syndicated programming[37] principally because it would be unreasonably impractical and expensive for local stations to search for and obtain licenses from thousands of composers and publishers. The trial testimony did establish beyond a doubt that it would be unreasonably costly and inefficient for local television stations to track down and negotiate performing rights licenses with the thousands of composers and publishers whose music is contained in the syndicated

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tinguishable. Further, the district court's concern in *CBS* that because CBS had not even negotiated a per program license it could not complain about hypothetically burdensome terms is also not applicable here. The court in *CBS* expressly distinguished the networks from local stations which had, in fact, negotiated per program terms. ASCAP's argument that, as in *CBS*, its per program license does not exist is unavailing. ASCAP may not be insulated by the fact that the per program license has fallen into disuse since local stations' last effort to alter its terms.

37. Plaintiffs do not contend that direct licensing is not a realtistic alternative for locally-produced programming. Since local television stations deal directly with the composers or copyright owners of the music contained in locally-produced programs, stations would not encounter difficulties in finding and obtaining music licenses from those composers and copyright owners. Of course, as long as the blanket license exists, direct licensing of the locally-produced portion of local station broadcasting is not commercially feasible due to the double payment situation that would arise. Given the double payment snare, direct licensing would not be a realistically available alternative unless the blanket license were discarded entirely.

programming broadcast by local television stations and that direct licensing, were it to entail such nationwide searches and multiple negotiations, would not be a realistically available marketing alternative to the blanket license. Defendants contend, however, that alternative machinery would arise, should direct licensing be actively pursued by local television stations, that would render direct licensing reasonably efficient and therefore a realistically available alternative. Specifically, defendants point to the Harry Fox Agency, which on behalf of publishers now licenses to producers the synchronization rights for nearly all of the preexisting music performed in movies and television shows in the United States, and argue that in response to a perceived demand for direct licensing the Harry Fox Agency would expand its operations to include performing rights.

There is no question either that the Harry Fox Agency could expand to license performing rights or that another agency could be established by publishers to accomplish the task. The question is whether the record supports the contention that either the Harry Fox Agency or another agency would, to accommodate the desires of local television stations, develop machinery that would permit direct licensing to replace the present blanket licensing system. The court finds that the record does not support this contention. To the contrary, the inference to be drawn from the evidence is that the efforts of local television stations to bring about direct licensing machinery would be thwarted due to their lack of power in the music industry. Comparison with *CBS* is instructive. Faced with a similar argument, the district court in *CBS* concluded that the necessary machinery for direct licensing would arise within

a reasonable period and that direct licensing was accordingly an available alternative for CBS. 400 F. Supp. at 962-68. The district court's conclusion was based on its finding that CBS and its affiliated program producers could, by demanding direct licensing, bring to bear sufficient market power to stimulate either expansion within the Harry Fox Agency or the creation of a new agency to license television performing rights on behalf of thousands of composers and publishers. As the court reasoned, the formation of a centralized agency to handle performing rights transactions would obviate the need copyright holders would otherwise have to line up at CBS' door. That reasoning underscores the crucial factual differences between these two lawsuits. In the instant case, the trial testimony made clear that local television stations acting individually and severally would possess no such awesome power over copyright owners. Since no lines would form at the doors of local television stations, no centralized machinery would arise to facilitate direct licensing. The record reveals that no agency that represents publishers could be expected to submit to the demands of local stations to alter its licensing system should those demands conflict with the wishes of publishers. It is equally clear that composers and publishers are content with the present licensing system and, absent a degree of pressure that several local stations could not exert, would not seek to undermine the system.[38] Lacking power over publishers, local stations could neither compel a

38. The court does not hereby resurrect the "disinclination" theory rejected in *CBS*. The district court in *CBS* found that copyright owners would not be disinclined to deal directly with CBS in view of CBS' market power. The district court did not find that absent CBS' power copyright owners would be inclined to change the system. It is the latter situation that is presented here.

change in the Harry Fox Agency, *see* Berman Dep. 253; Brackman Dep. 58, nor stimulate creation of a new agency to represent publishers in direct licensing negotiations. There is an additional distinction with *CBS*. Beyond its power over copyright owners, CBS has considerable leverage over the producers whose programs it broadcasts. The court in *CBS* posited that both CBS itself and CBS producers would apply pressure on the Harry Fox Agency to expand its operations and it is reasonable to assume that the Agency would be responsive to pressure from the producers to whom it traditionally licenses music rights. Local stations have no such connections to syndicators and there is no basis to conclude that the Harry Fox Agency would respond to requests from various local station representatives to license performing rights in the same way as it would to concerted demands by CBS producers familiar to the Agency.

The court therefore finds that unlike CBS, local television stations could not by virtue of their market power effect the transition to a reasonably practical, centralized system of direct licensing.[39] Individual transactions with numerous copyright owners are not realistic. The court accordingly holds that for plaintiffs direct licensing is not a realistically available marketing alternative to the blanket license.

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39. The court reaches this conclusion notwithstanding the fact found so probative in *CBS* that plaintiffs have never attempted to achieve direct licensing. In view of the court's findings that direct licensing is utterly unrealistic without centralized machinery and that the probability that such machinery would be created at the behest of local stations is remote, it would be unreasonable to draw any inferences unfavorable to plaintiffs' claims due to the absence of such self-help efforts. Plaintiffs did, in any event, pursue the alternative they ultimately seek to bring about. Those efforts to achieve source licensing are discussed in the following subsection.

4. *Source Licensing*

The current availability and comparative efficiency of source licensing have been the focus of this lawsuit. Plaintiffs maintain both that source licensing is not now an available alternative to the blanket license, and that, should the blanket license be enjoined, source licensing would naturally evolve as the most efficient licensing system. The latter contention shall be considered in the next section. In considering the former contention the court shall first assess the probative value of plaintiffs' recent efforts to achieve source licensing by written request to producers and distributors and then analyze the ability of local television stations to achieve source licensing under present market conditions.

During the long discovery phase of this litigation, counsel for defendants on more than one occasion invited plaintiffs to approach producers and request source licensing. Plaintiffs eventually did, sending out more than 200 written requests that producers secure music performing rights at the source from composers and publishers. The parties' interpretations of what ensued differ extraordinarily. What is certain is that source licensing did not supplant the blanket licensing system; beyond that, the results are disputed. Plaintiffs contend that their requests were flatly rejected by all but 25 insignificant syndicators. Defendants argue that the responses of the syndicators demonstrate their willingness to negotiate changes in the licensing system, but that plaintiffs were not willing to negotiate in good faith. The parties' essential disagreement concerns the motives of the local stations. According to defendants, plaintiffs' requests were nothing other than disingenuous attempts to garner refusals in order to create a record for

this lawsuit. Defendants stress in particular that plaintiffs never quoted any prices that they would be willing to pay for television performing rights. Plaintiffs counter that it was the sellers' obligation to initiate price negotiations and that the syndicators' carefully-phrased rejection letters were composed solely for the benefit of the court. The court declines to choose between these contrary versions of the conversations and correspondence exchanged between local stations and syndicators, and instead finds plaintiffs' source licensing foray so darkened by the shadow of the approaching trial that its results may not be relied upon to support either side. Nevertheless, the court believes that it can glean from the syndicators' responses certain significant facts that will be discussed below. An additional consequence of plaintiffs' self-help effort, albeit tainted, is that it avoids the difficulty encountered by the plaintiff in *CBS*, where it was found that the claim that an efficient alternative was not realistically available was seriously prejudiced by the fact that the plaintiff had never actually tried to attain the alternative. *See* 600 F.2d at 935-36; 400 F. Supp. at 752-53.

The court has already set forth its conclusion that local stations possess little bargaining power over syndicators offering desirable programming. If unsatisfied with one station's terms for the purchase of a syndicated program, the syndicator has the commercially available option to sell the program to a competitor station in that market or perhaps to bypass the market entirely.[40] It is not, however,

40. Defendants argue that this line of reasoning tracks the "competitive disadvantage" theory rejected in *CBS*. Defendants are incorrect. The Court of Appeals in *CBS* ruled that direct licensing could

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a viable option for local television stations to bypass desirable syndicated programs when offered for sale or license without television performing rights in the music contained therein. It logically follows that should individual local stations, not acting in concert, request or demand that a syndicator alter its established practices and package its program with the music performing rights, the syndicator would not find itself compelled to do so. This conclusion is supported as well by the testimony of several local television station representatives that local stations are in no position to dictate syndication terms to syndicators and by the responses of syndicators to plaintiffs' requests for source licensing. Those responses make clear, even given the problems discussed above, at the least that syndicators are not susceptible to moderate pressure from the local television station industry and that syndicators are more concerned by the prospect of abandoning longstanding business methods than by the possibility of disappointing their local station customers. While cognizant of the fact that plaintiffs bear the burden of proof with respect to all issues, the court finds it significant that defendants produced at trial no syndicators to rebut both the testimony of local station respesentatives and the evidence that may be culled from the syndicators' written responses.

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not be held unavailable merely because CBS would find itself at a competitive disadvantage vis-a-vis the two other networks if CBS were to change to direct licensing while the other two remained under the blanket license. 620 F.2d at 938 n. 9; *see also* 400 F.Supp. at 764. In the instant case, by contrast, the court finds that local stations could not bring about source licensing due to the competitive disadvantage that those stations demanding source licensing would suffer vis-a-vis those that did not. The court's reasoning is clearly distinct from that rejected in *CBS*.

The question therefore is whether syndicators would willingly change to a source licensing system. Nothing in the record indicates that they would; indeed, the evidence is to the contrary. Initially, there is the matter of inertia. Absent compulsion or premium prices that local stations could not pay, syndicators would have no impetus to depart from their standard practices and request and pay for television performing rights merely in order to pass them along to local stations. The importance of this inertia is apparent in most of the responses of syndicators to plaintiffs' source licensing requests. In addition, most of the leading syndicators, because of their affiliated publishing interests, have an interest in ensuring the maintenance of the lucrative blanket licensing system. That interest is not denuded by the fact that syndicators' music royalties are a small fraction of their syndication revenues because under the present system syndicators need not choose between their syndication revenues and the royalties earned by their affiliated publishing companies.

The court therefore finds that plaintiffs can neither compel source licensing by demanding it nor achieve source licensing by requesting it. Those with the incentive to change the system lack the power; those with the power lack the incentive. There is no realistically available marketing alternative to the blanket license.

C. *Is the Blanket Licensing System Anticompetitive?*

Having concluded that local television stations have not freely chosen the blanket license among realistically available marketing alternatives, it remains for the court to determine whether the blanket licensing system unreasonably restrains the licensing of music performing rights to local

stations.[41] To that end, the court shall weigh the blanket license's anticompetitive effects against its efficiencies and then assess the advantages and disadvantages of the source licensing alternative.

The anticompetitive effects of the blanket license are apparent. Copyrighted compositions are pooled and sold on an all-or-nothing basis; the selling power of one adds to that of the others and the monopoly of all is enlarged. Such "block-booking" is not new to antitrust scrutiny. *See, e.g., United States v. Loew's, Inc.*, 371 U.S. 38, 83 S.Ct. 97, 9 L.Ed.2d 11 (1962) (package distribution of films to television stations enjoined); *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 68 S.Ct. 915, 92 L.Ed. 1260 (1948) (package selling of films to theater owners enjoined). The system prevents price competition between and among the pooled compositions. As discussed above, the artificial splitting of the licensing of television performing rights from the licensing of all other music rights shifts the market for performing rights from the producer level, where negotiations could be competitive, to the local station level,

41. BMI argues that the court must additionally find that defendants' practices cause the absence of alternatives, on the ground that the court could not otherwise conclude that the blanket license itself restrains trade. The argument is analytically flawed and unsupported by the *CBS* case. The Court of Appeals in *CBS* considered the availability of alternatives to be a threshold issue. That is, even if there is no price competition under the blanket licensing system, if the lack of competition endures due to customer preference then defendants cannot be held liable under the antitrust laws for restraining trade. Once it is established that users have no alternative to the blanket license and that the system does not exist by virtue of customer preference, the court may consider whether the system restrains trade. The restraint, if it then be found, is within the system. In order to prove the restraint there is no need to prove that defendants' practices proximately caused the lack of alternatives to the system. *See Broadcast Music, Inc. v. Moor-Law, Inc.*, 527 F.Supp. 758, 766 n. 10 (D. Del. 1981), *aff'd mem.*, 691 F.2d 490 (3d Cir. 1982).

where the blanket license shields copyright owners from the price competition that characterizes negotiations at the source.[42] Realistic alternatives offering potential competition and consequent price restraint do not exist.[43] The local station has no choice but to purchase access to the entire repertories of ASCAP and BMI although the station's needs could certainly be satisfied by a far more limited

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42. On the strength of the expert testimony of its economist Bruce M. Owen, BMI contends that the overall price of television must be competitively set by virtue of the price competition that characterizes the licensing of synchronization and other rights at the producer level. The contention is neither factually nor theoretically tenable. The price of the synchronization and other rights to the music in a particular program is set competitively in negotiations between producers and copyright owners. The price of the performing rights to the music in a particular program is encompassed within the fee for the blanket license negotiated between local television stations and ASCAP and BMI. There is no evidence that the competitive limits on the price of synchronization rights exert any constraint on the price of performing rights. Nor is the court aware of any economic theory or antitrust principle that compels, or even permits, the conclusion that the sum price of a product may be considered competitively set when the sum is comprised of two parts negotiated separately in two distinct transactions, one transaction characterized by price competition, the other not. The court was therefore unpersuaded by the testimony of Mr. Owen. Indeed, the court found the impact of Mr. Owen's entire testimony significantly diminished by the fact, elicited during cross-examination, that Mr. Owen previously testified, while serving as the chief economist of the Antitrust Division of the Department of Justice, on behalf of the Government in *United States v. Columbia Pictures Indus., Inc.*, 507 F.Supp. 412 (S.D.N.Y. 1980), that ASCAP is an anti-competitive cartel.

43. Ultimately, price constraint is provided not by competition but by the consent decree's provision that users may petition the district court to determine a reasonable fee. Of course, even were this court somehow to determine that defendants' blanket license fees are reasonable, the system would not thereby be immune to antitrust attack. The mandate of the Sherman Act is not that courts determine reasonable prices but that courts intervene where necessary to permit free market competition to set prices. *See Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643, 647, 100 S.Ct. 1925, 1927, 64 L.Ed.2d 580 (1980) (per curiam); *United States v. Trenton Potteries Co.*, 273 U.S. 392, 397-98, 47 S.Ct. 377, 379, 71 L.Ed. 700 (1927).

selection. The station controls neither the number nor quality of the compositions it purchases and cannot reduce its costs by reducing its use of music. The price the user pays, as Justice Stevens stated,

> is unrelated either to the quantity or quality of the music he actually uses, or, indeed, to what he would probably use in a competitive system. Rather, in this unique all-or-nothing system, the price is based on a percentage of the user's advertising revenues, a measure that reflects the customer's ability to pay but is totally unrelated to factors—such as the cost, quality, or quantity of the product—that normally affect price in a competitive market.

BMI v. CBS, 441 U.S. at 31, 99 S.Ct. at 1568 (Stevens, J., dissenting) (footnotes omitted).

Arrayed against these significant restraints on competition are the recognized virtues of the blanket license. *See BMI v. CBS*, 441 U.S. at 20-24, 99 S.Ct. at 1562-64. It is undisputed that these efficiencies render the blanket license pro-competitive, and even necessary, for small users such as nightclubs and restaurants who cannot predict in advance their music needs,[44] and it was in that context that the blanket license arose. A local television station's use of music is not, however, akin to that of a local tavern and analysis of the market reveals that the benefits of blanket licensing of local television stations do not balance the burdens.

Before considering these benefits and burdens, the court notes two basic problems in defendants' efficiency argument. First, both of defendants' expert witnesses—Bruce M. Owen and William M. Landes—testified that the efficiency of the

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44. *See Broadcast Music, Inc. v. Moor-Law, Inc.*, 527 F.Supp. 758 (D. Del. 1981), *aff'd mem.*, 691 F.2d 490 (3d Cir. 1982) (antitrust challenge to blanket licensing of small establishments offering live music dismissed upon finding that blanket license was necessary and that there were no efficient or even feasible alternatives).

blanket license is demonstrated by the fact that it has been freely chosen by users from among available alternatives. That premises has, of course, been rejected as a matter of fact. Second, defendants have stressed the undeniable fact that the blanket license does not restrict output; indeed, the blanket license encourages the use of music by eliminating marginal costs once the license is purchased. While recognizing that the stimulus to use music is a virtue of the license, the court finds no compelling reason to give this fact the overwhelming emphasis that defendants urge. In this market, due to the absence of price competition, uncurtailed supply has no effect on prices.

The court first considers transaction costs. The blanket license permits local television stations to obtain all the music they might need via two annual negotiations between the All Industry Committee and ASCAP and BMI. Defendants contend that any alternative to the blanket license would involve a multitude of costly transactions with individual copyright owners over music performing rights. That contention is not supported by the record. Negotiations for synchronization and other rights to the music contained in syndicated programming already occur and the evidence is clear that these negotiations would not become complicated or costly by the inclusion of television performing rights. It is only with respect to the still limited number of live and live-on-tape syndicated programs which do not require negotiation of synchronization rights that the blanket license reduces otherwise necessary transaction costs. Syndicated programming aside, defendants emphasize that because synchronization rights are not negotiated for most of the music contained in locally-produced programming the blanket license substantially reduces transaction costs for such programming. The court agrees that the blanket

license reduces transaction costs for locally-produced programming, but disagrees as to the significance of the savings. Plaintiffs introduced into evidence uncontroverted data that establish that the music contained in locally-produced programming comprises on the average less than 10% of local stations' total use of music. The trial testimony further established that such music is comparatively insignificant not only quantitatively but qualitatively (in terms of entertainment value) as well and its proportionate use might decrease could savings result thereby. Moreover, since local stations deal directly and locally with many of the copyright owners of the music contained in locally-produced shows, it should not be assumed that without the blanket license local stations would ordinarily be obliged to travel great distances to negotiate with unknown composers or publishing companies. The court therefore finds the blanket license's transaction cost savings to be negligible regarding the vastly predominant portion of the music contained in local station programming and insignificant regarding the remainder.

The second principal benefit of the blanket license is the elimination of monitoring costs. Under the blanket licensing system, there is, of course, no need to monitor local television stations to detect the unauthorized use of music because any musical composition used would be covered by one or the other license. There is nevertheless no indication that monitoring costs would be significant under an alternative system such as source licensing. The principal purpose of defendants' current monitoring system is not to detect unauthorized music use but to discover which compositions are being performed so as to effectuate the royalty distribution system. That purpose would be vitiated under a source licensing system that would accomplish royalty distribution directly. Moreover, as plaintiffs' expert wit-

ness Dr. Paul L. Joskow explained, it is highly unlikely that local television stations would risk infringement liability in order to avoid obtaining performing rights. *See also Broadcast Music, Inc. v. Moor-Law, Inc.*, 527 F. Supp. 758, 761-62 (D. Del. 1981), *aff'd mem.*, 691 F.2d 490 (3d Cir. 1982). Under a source licensing system producers would assume the responsibility of obtaining performing rights from copyright owners and would pass the rights along to local stations. Syndicated programming would therefore not present monitoring problems. As for locally-produced programming, there is, again, no credible threat of unauthorized music use by television stations. Thus, while the blanket license reduces monitoring costs, the reduction is not significant in the context of the local television industry.

Another asserted benefit of the blanket license is that it reduces up-front costs for producers engaged in the high-risk business of packaging syndicated programs by relieving them of the need to purchase television performing rights at the same time that they obtain all other necessary music rights. The court finds this benefit insignificant. The record makes clear that performing rights fees are a miniscule percentage of the total cost of producing a syndicated program. It is therefore extremely unlikely that the additional cost of music performing rights would deter any syndicators from producing programs.

Finally, the blanket license offers users maximum flexibility by permitting the use of any song in the organization's repertory at any time without fear of copyright infringement. Such flexibility is an extremely important advantage where music use cannot be planned in advance. In the local television industry, however, the benefit is minimal. With the exception of live programming, all of the music contained in syndicated programming is, of course,

selected by producers long in advance of the performance and local stations accordingly have no need for the capacity to use such music on the spur of the moment. Nor is there any indication that producers hiring composers or selecting pre-existing music would be constrained in their selection by the fear that they might not be able to clear performing rights at the source. Although local stations would probably be constrained in their selection of music for use in locally-produced programming, the constraint would be of little import in view of the fact that the music used in such programming is quantitatively and qualitatively insignificant. The number of unplanned performances of copyrighted work on local station broadcasts of concerts or parades *et al.* is also not high.

In sum, the insignificant cost savings of the blanket license in the context of the local television industry do not balance the anticompetitive consequences of the absence of price competition.

Before issuing an injunction, the court must consider the consequences for competition in the relevant market of any such remedy. It is not substantially disputed that, should the blanket license be enjoined, source licensing would probably evolve. The court's rule of reason analysis shall therefore conclude with a brief assessment of source licensing.

Of principal significance, in sharp contrast to the blanket license, licensing of television performing rights at the source would permit price competition among musical compositions. The distinction is critical. The preservation of competition is the fundamental purpose of the Sherman Act whose premise is that unrestrained competition will yield the lowest prices and the best allocation of resources and will spur innovation. *See Northern Pac. R. Co. v. United States,* 356 U.S. 1, 4, 78 S.Ct. 514, 517, 2 L.Ed.2d 545 (1958). The significance of potential disadvantages such as trans-

action and monitoring costs has already been considered and found negligible. It is clear to the court that source licensing would be more pro-competitive than the existing blanket license. In addition to defendants' argument, now rejected, that the blanket license is a highly efficient means of licensing television performing rights, defendants' major objection to source licensing is that, should the blanket license be enjoined, copyright owners would surely unite to form an anticompetitive guild with minimum fees and residual rates that would be shielded from antitrust scrutiny by the labor exemption. Assuming that the unionization threat is real, the court cannot be deterred from remedying an antitrust violation by the fact that Congress has chosen for various reasons of social policy to insulate from antitrust attack activity that may result from the remedy fashioned here. The unionization threat does not therefore preserve the blanket license.

CONCLUSION

For the above reasons, the court holds that the blanket licensing of music performing rights to local television stations unreasonably restrains trade in violation of Section 1 of the Sherman Act. [45] Defendants ASCAP, BMI and their respective members and affiliates must accordingly be enjoined from continuing their anticompetitive practices. Settle judgment on notice.

SO ORDERED.

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45. As is clear from the foregoing, the blanket licensing system—in particular, its fee which is based on users' revenues rather than actual use—exists not for the convenience of local television stations but due to defendants' patent power. Accordingly, defendants' licensing practices must also be declared misuse of copyright. *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 139, 89 S.Ct. 1562, 1585, 23 L.Ed.2d 129 (1969); *see also BMI v. Moor-Law, Inc., supra*, 527 F.Supp. at 772-73.

APPENDIX C

Judgments of the District Court

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Filed: January 4, 1983

78 Civ. 5670 (LPG)

BUFFALO BROADCASTING COMPANY, INC., *et al.*,
Plaintiffs,

against

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, *et al.*, and BROADCAST MUSIC, INC., *et al.*,
Defendants.

JUDGMENT AND PERMANENT INJUNCTION

The Court, after trial, having entered an opinion and order, dated August 19, 1982, granting judgment in favor of plaintiffs and the plaintiff class against defendants and the defendant classes, all as more fully set forth in the Court's opinion and order; now, therefore,

IT IS ORDERED AND ADJUDGED:

I.

As used in this Judgment:

(A) "ASCAP" means defendant American Society of Composers, Authors and Publishers;

(B) "BMI" means defendant Broadcast Music, Inc.;

(C) The defendant "ASCAP class" means all persons or entities who are members of ASCAP, as of the date of entry of this Judgment, and from whom ASCAP obtains the nonexclusive right to license performing rights to third parties;

(D) The defendant "BMI class" means all persons or entities who are affiliates of BMI, as of the date of entry of this Judgment, and from whom BMI obtains the nonexclusive right to license performing rights to third parties;

(E) "Defendant classes" means the defendant "ASCAP class" and the defendant "BMI class";

(F) "Local television station" means any commercial television station in the United States licensed by the Federal Communications Commission to broadcast a television signal;

(G) "Plaintiff class" means all persons or entities who, since November 27, 1978, have owned a local television station as defined above, and have obtained, prior to the date of entry of this Judgment, performing rights for their local television station pursuant to music license agreements with ASCAP and/or BMI, excluding, however, CBS, Inc., National Broadcasting Company, Inc., American Broadcasting Companies, Inc. and WSM, Inc.;

(H) "Network program" means any program broadcast by two or more local television stations simultaneously and for which broadcast rights are obtained by the local television stations from either CBS Inc., National Broadcasting Company, Inc. or American Broadcasting Companies, Inc.;

(I) "Syndicated program" means any program which is offered for sale or license to any local television station owned by any member of the plaintiff class for broadcast as a non-network program, including regional or national commercial advertisements contracted for by a local television station;

(J) "Locally produced program" means any program which has been produced by or on behalf of any local television station owned by any member of the plaintiff class, including commercial advertisements produced by a local television station or for broadcast in a specific local television market;

(K) "Performing right" means the right under the Copyright Laws of the United States to make a non-dramatic public performance of a copyrighted musical composition; and

(L) "Produced" means, with respect to any program, the point in time when the production process has been completed.

II.

Commencing on the effective date of this Judgment (as provided for in Section X herein), and except as may otherwise be ordered by this Court (in accordance with Section VII(A)(ii) hereof), ASCAP and BMI are permanently enjoined and restrained from granting to any local television station owned by a plaintiff class member performing rights in any syndicated program.

III.

Nothing in this Judgment shall be construed to enjoin and restrain ASCAP and BMI from granting to any local television station owned by a plaintiff class member any form of mutually agreed upon license covering performing rights in locally produced programs.

IV.

Commencing on the effective date of this Judgment (as provided for in Section X herein), and except as may otherwise be ordered by this Court (in accordance with Section VII(A)(ii) hereof), all members of the defendant classes are permanently enjoined and restrained from authorizing any performing rights society to grant to any local television station owned by a plaintiff class member performing rights in any syndicated program.

V.

The provisions of this Judgment applicable to ASCAP, BMI and the defendant classes shall apply to each such defendant or defendant class member, as the case may be, its successors and assigns, and to each of their officers, directors, agents, employees, and to all other persons acting or claiming to act under, through or for such defendant or defendant class member.

VI.

ASCAP and BMI are ordered and directed, at their expense, to mail copies of this Judgment to all members of the ASCAP class, in the case of ASCAP, and all members of the BMI class, in the case of BMI, within sixty days of

the date of entry of this Judgment; and in that connection, ASCAP and BMI are further ordered and directed to include therein a notice, approved by the Court, that all such class members will be bound by the terms of this Judgment.

VII.

(A) Jurisdiction of this cause is retained:

(i) for a determination of damages, if any, to which plaintiffs and the plaintiff class may be entitled, pursuant to Section 4 of the Clayton Act, 15 U.S.C. § 15, including any further discovery and submission of evidence as may be appropriate to such determination;

(ii) for a determination of the appropriate manner, method and amount of payment for local television station performing rights for music contained in syndicated and locally produced programs produced prior to the effective date of this Judgment or for which a local television station owned by a plaintiff class member has obtained broadcast rights prior to the effective date of this Judgment, including any further discovery and submission of evidence as may be appropriate to such determmination; and

(iii) for a determination of the reasonable attorneys' fees of plaintiffs and the plaintiff class in the prosecution of this action and such other costs and fees to which plaintiffs may be entitled by law, including any further discovery and submission of evidence as may be appropriate to such determination.

(B) The funds deposited and existing in the escrow accounts, established pursuant to the Stipulation and Order dated December 15, 1978, as modified by a letter agreement dated June 30, 1980, in the case of BMI, and by the letter agreement between the parties dated December 15, 1978, as

modified by a letter agreement dated June 10, 1980, in the case of ASCAP, shall remain in the escrow accounts pending the determination of damages, if any, referred to in Section VII(A) herein.

VIII.

(A) During the period of time commencing with the first day of the calendar month following the month in which this Judgment is signed by the Court and ending on the effective date of this Judgment (as provided for in Section X herein), any local television station owned by a plaintiff class member shall be entitled to obtain blanket licenses from ASCAP and BMI (hereinafter the "interim blanket license(s)"), on the terms and conditions hereafter set forth, by paying the license fees prescribed herein and by otherwise complying with said terms and conditions;

(B) Except as hereafter provided, the interim blanket licenses shall be in the same form and contain the same terms and conditions as the blanket licenses with the local television stations which have existed, in the case of ASCAP, pursuant to the terms of a letter agreement between the parties dated December 15, 1978, as modified by a letter agreement dated June 10, 1980, and, in the case of BMI, pursuant to the terms of the Stipulation and Order, dated December 15, 1979, as modified by a letter agreement dated June 30, 1980;

(C) The interim blanket licenses shall be terminable on the grounds set forth therein and, in addition, shall be terminable by any local station at the end of the next succeeding calendar month, upon the giving of thirty (30) days' notice;

(D) The fees payable for an interim blanket license shall be:

(i) for any local station owned by a plaintiff class member which operated under an ASCAP and BMI license in 1980, amounts equal to the amounts such station was obligated to pay to ASCAP and BMI in license fees for the year 1980, payable in monthly installments on an annualized basis; or

(ii) for any local station owned by a plaintiff class member which did not have an ASCAP or BMI license during 1980, but thereafter obtained a license from ASCAP and BMI, amounts equal to the product of (a) the amounts such station will have been obligated to pay ASCAP and BMI in license fees for the year 1982, and (b) the ratio of the amounts obligated to be paid by the plaintiff class members for 1980 to the amounts obligated to be paid by the plaintiff class members for 1982, payable in monthly installments on an annualized basis.

(E) At any time before the effective date of this Judgment (as provided for in Section X herein), should the effective date be extended beyond one year from the date of the Judgment, counsel for the plaintiff class may, on behalf of the class, apply to the Court for a reduction in the fees to be paid for the interim blanket licenses; any reduction thereafter ordered by the Court shall be retroactive to the date of the making of the application.

(F) At any time after this judgment is entered, the plaintiff class or any local television station owned by a plaintiff class member may apply to this Court for a pro-

spective reduction in the amount of the interim blanket license fees based upon a showing that such local station(s) have obtained performing rights licenses from parties other than ASCAP and BMI.

(G) All fees paid under the interim blanket licenses shall be without prejudice either to plaintiffs' right to claim damages in accordance with paragraph VII(A)(i) of this Judgment during the interim license period or ASCAP's or BMI's right to seek a retroactive adjustment of such fees following the resolution of all appeals which may be taken from this Court's August 19, 1982 Opinion and this Judgment.

(H) Nothing contained herein shall require any local television station owned by a plaintiff class member to obtain a license from ASCAP or BMI.

IX.

(A) Each member of the plaintiff class, or any or all of them jointly, shall have the right to seek enforcement of, or sanctions and punishments for violations of, this Judgment against ASCAP, BMI or any defendant class member. Any such petition for a modification, construction, interpretation or clarification of this Judgment or any enforcement proceeding which, in the opinion of the Court, may require such a modification, construction, interpretation or clarification, shall proceed as a class action on behalf of or against, as the case may be, the plaintiff class or the defendant classes if it appears that the interests of the absent members of the class may be affected.

(B) Notwithstanding any other provision hereof, after a minimum period of five years from the effective date of

this Judgment, ASCAP or BMI may make an application to the Court for the right to license performing rights in syndicated programs through a form of per program license or such other manner as the Court at that time may find not inconsistent with the terms and effect of this Judgment.

The effective date of this Judgment shall be February 1, 1984. Any party may make an application to the court for a postponement of such date, which application may be granted upon such terms as the Court determines appropriate.

Dated: January 3, 1983
New York, New York

/s/ LEE P. GAGLIARDI

U.S.D.J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Filed: January 12, 1984

78 Civ. 5670 (LPG)

BUFFALO BROADCASTING COMPANY, INC., *et al.*,
Plaintiffs,

against

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, *et al.*, and BROADCAST MUSIC, INC., *et al.*,
Defendants.

ORDER MODIFYING JUDGMENT AND PERMANENT INJUNCTION

Upon the consent of the parties hereto,

IT IS ORDERED that the first sentence of Section X of the Judgment and Permanent Injunction herein, dated January 3, 1983, be modified to provide, as follows:

"The effective date of this Judgment shall be November 1, 1984."

Dated: January 10, 1984
New York, New York

/s/ LEE P. GAGLIARDI

U.S.D.J.

Signature and entry of the foregoing Order is hereby consented to:

PAUL, WEISS, RIFKIND, WHARTON & GARRISON

By /s/ Allan Blumstein

and

BERNARD KORMAN, ESQ.

Attorneys for defendants
American Society of Composers, Authors and Publishers, et al.

HUGHES HUBBARD & REED

By /s/ Norman C. Kleinberg

Attorneys for defendant
Broadcast Music, Inc.

SKADDEN, ARPS, SLATE, MEAGHER & FLOM

By /s/ Barry Garfinkel

Attorneys for defendants
Al Gallico Music Corp., et al.

WEIL, GOTSHAL & MANGES

By /s/ James W. Quinn

Attorneys for plaintiffs

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Filed: October 29, 1984

78 Civ. 5670

BUFFALO BROADCASTING COMPANY, INC., *et al.*,
Plaintiffs,

against

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, *et al.*, and BROADCAST MUSIC, INC., *et al.*,
Defendants.

ORDER

GAGLIARDI, D.J.

Plaintiffs have moved this court for an order postponing the effective date of the Judgment and Permanent Injunction entered on January 4, 1983 (the "Judgment"). As modified by an order dated January 12, 1984, the Judgment has an effective date of November 1, 1984. In view of the Second Circuit's recent decision reversing the Judgment, it is clear that its effective date should be further postponed pending the issuance of the mandate of the Court of Appeals. However, it would be inappropriate to grant a postponement without also modifying the terms of the interim licensing established by the Judgment.

Accordingly, Section VIII of the Judgment is hereby modified, effective November 16, 1984, to provide that any local television station owned by a plaintiff class member that elects to operate pursuant to blanket licenses shall pay license fees on such terms and conditions as the parties agree upon, without prejudice to the right of any party to apply to Judge Conner for a rate determination. Section X of the Judgment is hereby modified to provide that the effective date of the Judgment shall be thirty days after the date on which the mandate of the Court of Appeals issues.

So Ordered.

/s/ Lee P. Gagliardi

U.S.D.J.

Dated: White Plains, New York
October 26, 1984

APPENDIX D

Judgment of the Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the eighteen day of September one thousand nine hundred and eighty-four.

Present:

HON. JON O. NEWMAN,
HON. RALPH K. WINTER,
HON. GEORGE C. PRATT,*
Circuit Judges.

Filed: Sept. 18, 1984

83-7058, 83-7060, 83-7062

BUFFALO BROADCASTING COMPANY, INC., KID BROADCASTING CORPORATION, KWTX BROADCASTING COMPANY, INC., METROMEDIA, INC., and STORER BROADCASTING COMPANY, on behalf of themselves and ALL PERSONS OR ENTITIES WHO OWN LOCAL TELEVISION STATIONS WHICH OBTAIN MUSIC LICENSE AGREEMENTS WITH AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS AND/OR BROADCAST MUSIC, INC.,
Plaintiffs-Appellees,

v.

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, STANLEY ADAMS, as President of American Society of Com-

* After oral argument, Judge Cardamone recused himself and was replaced by Judge Pratt, who has had the benefit of a transcript of the oral argument.

posers, Authors and Publishers, CY COLEMAN, HAL DAVID, FAMOUS MUSIC CORP., MCA, INC., MORTON GOULD, SHAPIRO, BERNSTEIN & CO., INC., on behalf of themselves and all other members of American Society of Composers, Authors and Publishers, BROADCAST MUSIC, INC., AL GALLICO MUSIC CORP., PAUL ANKA, JERRY BOCK, SHELDON HARNICK, HOLLIS MUSIC, INC. and UNART MUSIC CORP., on behalf of themselves and all other affiliates of Broadcast Music, Inc.,

Defendants-Appellants.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is reversed in accordance with the opinion of this court with costs to be taxed against the appellees.

Elaine B. Goldsmith,
Clerk

By: /s/ EDWARD J. GUARDARO

Edward J. Guardaro,
Deputy Clerk

APPENDIX E

Order of the Court of Appeals Denying Petition for Rehearing

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

Filed: November 1, 1984

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 1st day of November one thousand nine hundred and eighty-four.

83-7058, 83-7060, 83-7062

BUFFALO BROADCASTING COMPANY, INC., KID BROADCASTING CORPORATION, KWTX BROADCASTING COMPANY, INC., METROMEDIA, INC., and STORER BROADCASTING COMPANY, on behalf of themselves and ALL PERSONS OR ENTITIES WHO OWN LOCAL TELEVISION STATIONS WHICH OBTAIN MUSIC LICENSE AGREEMENTS WITH AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS AND/OR BROADCAST MUSIC, INC.,

Plaintiffs-Appellees,

v.

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, STANLEY ADAMS, as President of American Society of Composers, Authors and Publishers, CY COLEMAN, HAL DAVID, FAMOUS MUSIC CORP., MCA, INC., MORTON GOULD,

SHAPIRO, BERNSTEIN & CO., INC., on behalf of themselves and all other members of American Society of Composers, Authors and Publishers, BROADCAST MUSIC, INC., AL GALLICO MUSIC CORP., PAUL ANKA, JERRY BOCK, SHELDON HARNICK, HOLLIS MUSIC, INC. and UNART MUSIC CORP., on behalf of themselves and all other affiliates of Broadcast Music, Inc.,

Defendants-Appellants.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the plaintiffs-appellees, Buffalo Broadcasting Company, Inc., and others,

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

ELAINE B. GOLDSMITH
Clerk

By FRANCIS X. GINDHART
Chief Deputy Clerk

APPENDIX F

Excerpts from Brief for the United States as Amicus Curiae in *Broadcast Music, Inc., et al.* v. *Columbia Broadcasting System, Inc.*, Nos. 77-1578 and 77-1583, Supreme Court of the United States (November 1978)

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

Nos. 77-1578 and 77-1583

BROADCAST MUSIC, INC., ET AL., PETITIONERS

v.

COLUMBIA BROADCASTING SYSTEM, INC.

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, ET AL., PETITIONERS

v.

COLUMBIA BROADCASTING SYSTEM, INC.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE

WADE H. MCCREE, JR.
Solicitor General

JOHN H. SHENEFIELD
Assistant Attorney General

FRANK H. EASTERBROOK
Deputy Solicitor General

WILLIAM H. ALSUP
Assistant to the Solicitor General

JOHN J. POWERS, III
ANDREA LIMMER
Attorneys
Department of Justice
Washington, D.C. 20530

* * *

B. PERFORMING RIGHTS SOCIETIES ARE NOT "NAKED RESTRAINTS," AND SO A DETAILED INQUIRY INTO THEIR COMPETITIVE CONSEQUENCES IS NECESSARY

ASCAP undoubtedly is an association composed of persons who otherwise are competitors. It offers a license at a cost set by ASCAP, and in so doing alters the circumstances under which copyrights are available in the marketplace. The arrangement challenged here thus has important features in common with other arrangements that this Court has held, are *per se* illegal. The court of appeals' analysis went no further.

* * *

APPENDIX G

Excerpts from Brief for the United States as Amicus Curiae in *Columbia Broadcasting System, Inc.* v. *American Society of Composers, Authors and Publishers, et al.*, No. 75-7600, United States Court of Appeals for the Second Circuit, on remand from the Supreme Court of the United States (November 5, 1979)

75-7600

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

COLUMBIA BROADCASTING SYSTEM, INC.,
Plaintiff-Appellant,

v.

AMERICAN SOCIETY OF COMPOSERS, AUTHORS & PUBLISHERS, *et al.*,
Defendants-Appellees.

ON REMAND FROM THE SUPREME COURT OF THE UNITED STATES

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

JOHN H. SHENEFIELD,
Assistant Attorney General,
BARRY GROSSMAN,
JOHN J. POWERS, III,
ANDREA LIMMER,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

• • •

ARGUMENT

I. ADDITIONAL FINDINGS ARE REQUIRED BEFORE THIS COURT CAN DETERMINE WHETHER THE CURRENT FORM OF BLANKET LICENSE OFFERED TO THE TELEVISION NETWORKS IS AN UNREASONABLE RESTRAINT OF TRADE

A. *The Analysis Required by the Rule of Reason*

Although the Sherman Act, read literally, prohibits all multi-party restraints of trade, the Supreme Court has held that it precludes only agreements that are "unreasonably restrictive of competitive conditions." *Standard Oil Co. of New Jersey* v. *United States*, 221 U.S. 1, 58 (1911); *National Society of Professional Engineers* v. *United States*, 435 U.S. 679, 690 (1978). There are two complementary analytical methodologies for determining whether an agreement constitutes an unreasonable restraint on competition. "In the first category are agreements whose nature and necessary effect are so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality —they are 'illegal *per se*.'" *National Society of Professional Engineers, supra*, 435 U.S. at 691-692. One activity which falls into this first category of analysis is price-fixing. *Id.* In the second category are "agreements whose competitive effect can only be evaluated by analyzing the facts peculiar to the business, the history of the restraint, and the reasons why it was imposed." *Ibid.*

This remand follows the Supreme Court's determination that the licensing activities challenged here fall into the second category of antitrust analysis. Thus "price-fixing," which "is a short-hand way of describing certain categories

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of business behavior to which the *per se* rule has been held applicable" (99 S. Ct. at 1557), is no longer an issue in this case.[6]

Under the rule of reason, the ultimate inquiry is whether a challenged combination is one that promotes competition or suppresses it. *National Society of Professional Engineers, supra,* 435 U.S. at 691. In a joint arrangement which involves the cooperative combination of actual or potential competitors, there is a risk that competition may be unnecessarily reduced. Such a combination, however, may generate substantial efficiencies unobtainable by other means. The *Professional Engineers* test to determine whether the arrangement is lawful is fairly straight forward. It requires a court to measure only the competitive effects attributable to an arrangement, and to determine on balance whether the net effect is to restrain competition.

To assess the competitive effects of the challenged activity the court should ask the following questions: Was the agreement entered into for the illegitimate purpose of limiting competition? If so, an elaborate inquiry into the actual effects of the conduct may be dispensed with for the parties themselves are presumed to have an accurate impression of the likely competitive effects of their actions on the market in which they operate. L. Sullivan, *Handbook*

6. Therefore, with due deference, we question the statement in this Court's order of July 6, 1979, that "the Supreme Court did not rule that price-fixing was not involved." We believe this is precisely what the Supreme Court did rule. 99 S. Ct. at 1557. That ruling does not, of course, preclude a finding, under a rule of reason analysis, that the practices at issue have had an adverse effect on price competition. But that is different from price-fixing, whose *per se* illegality precludes inquiry as to actual competitive effects. Here, by contrast, any anticompetitive effect on pricing must be weighed against any benefits of the collective activity to determine whether, on balance, the effects are anticompetitive; if they are, the activity is unlawful.

of the Law of Antitrust §71 (1977); See *Chicago Board of Trade* v. *U.S., supra,* 246 U.S. at 238; see also *United States* v. *United States Gypsum Co.,* 438 U.S. 422, nn.13, 21 (1978). Even if the purpose of the conduct was legitimate—to promote trade—the conduct is unlawful if it has the effect of unreasonably restraining trade. Moreover, conduct which initially had a net procompetitive effect may become illegal if the nature of the market or industry has changed so that the original justification no longer fully pertains. Pertinent to ascertaining the net competitive effect of the conduct at issue are the characteristics of the market in which the challenged activity operates—does the activity in fact promote competition or produce efficiencies; does it produce incentives or disincentives for competitive behavior; do defendants have sufficient market power to enable them to set a supra-competitive price or unreasonably onerous terms? See, *e.g., Standard Oil Co.* v. *U.S., supra,* 221 U.S. at 58; *Chicago Board of Trade, supra,* 246 U.S. at 238; *White Motor Co.* v. *U.S.,* 372 U.S. 253 (1963); *Citizen Publishing Co.* v. *U.S.,* 394 U.S. 131, 135 (1969); *National Society of Professional Engineers, supra,* 435 U.S. at 690 & n.15; R. Bork, *The Antitrust Paradox* 263-279 (1978); L. Sullivan, *supra,* §104.

If the court concludes that no anticompetitive effects stem from the concerted conduct, there is no need for further inquiry; the conduct is lawful. If the court concludes that the joint activity produces anticompetitive effects and no procompetitive benefits, the conduct is unlawful. But where the practices adopted by the participants to carry out a joint undertaking produce both competitive restraints and benefits the rule of reason analysis must be taken a step further. The court must determine whether the anticompetitive effects outweigh any procompetitive results.

If the challenged practices are necessary to produce the resulting procompetitive benefits then all such benefits would be weighed against any anticompetitive effects which are either inherent in the combination itself or result from the practices being challenged. The competitive effects of a joint activity, however, are severable. If a particular practice is not necessary to obtain certain procompetitive effects resulting from the combination, then those procompetitive benefits may not be weighed against the anticompetitive effects of the particular practice. Only those benefits attributable to the challenged practice may be weighed in the balance. See *United States* v. *Addyston Pipe & Steel Co.*, 85 Fed. 271, 282-83 (6th Cir. 1898), *aff'd*, 175 U.S. 211 (1899); *United States* v. *Sealy, Inc.*, 388 U.S. 350, 356 & n.3 (1967); *Citizen Publishing Co.*, [sic] 280 F. Supp. 978, 992 (D. Ariz. 1968), *aff'd*, 394 U.S. 131 (1969); L. Sullivan, *supra* at 208-209.

Whether a practice reasonably is necessary to secure procompetitive benefits depends on the availability of less restrictive alternatives. *Berkey Photo, Inc.* v. *Eastman Kodak Co.*, 1979-1 Trade Cas. ¶62,718 at 78,027 (2d Cir. 1979). When a less restrictive alternative is available, the use of a more restrictive practice cannot be deemed necessary to achieve the procompetitive benefits. At the time of formation of the joint activity, the parties involved must take reasonable steps to determine whether such less restrictive alternatives are available to achieve procompetitive effects. Moreover, the necessity of a practice should be evaluated throughout the life of the combination, and if it becomes apparent that less restrictive alternatives are available to achieve the benefits, then the more restrictive practice should no longer be deemed "necessary."

B. *Application of a Rule of Reason Analysis to this Case in View of the Prior Findings*

1. Neither the district court's nor this Court's prior opinion fully answers the questions pertinent to a rule of reason examination of competitive effects. Both courts focused primarily on the alleged anticompetitive effects of the challenged conduct. Neither sought to determine whether those effects were outweighed by procompetitive results relevant to network licensing.

The district court focused its analysis of anticompetitive effects solely on the foreclosure aspects of the blanket license.[7] While the court acknowledged CBS's arguments that copyright owners who derive benefit from the ASCAP-BMI licensing system might be "disinclined" to deal with CBS in a direct licensing market, and that CBS's perception of the risk entailed in abandoning the current licensing system to attempt direct licensing had kept it locked into the blanket license, the court believed that the crucial issue was not what CBS or copyright owners "perceived" their respective risks to be, but what in fact licensors would do when faced with requests for a direct license. 400 F. Supp. at 766-767. The court found from the testimony of publishers and song writers, and from the nature of the music industry (*id.* at 770), that "copyright owners would line up at CBS's door if direct dealing were the only avenue to fame and fortune." *Id.* at 768. It concluded "the [sic] CBS has failed to proved that the 'disinclination' of writers and publishers to leave the blanket system would ripen into a refusal to deal directly." *Ibid.* Believing that as long as a feasible alternative to blanket licensing existed CBS had

7. This may be due to the way in which CBS framed its complaint, *i.e.*, in terms of "compulsion." 400 F. Supp. at 745.

failed to prove an unlawful restraint, the district court did not attempt to ascertain whether the blanket license contributed to less blatant deviations from a competitive market. Finding no likelihood of an outright refusal to deal, the district court felt no need to conduct a balancing test or consider less restrictive alternatives.

This Court, on the other hand, found that a copyright owner [sic] disinclination to compete, coupled with what the Court viewed as the price-fixing aspects of the blanket license, warranted *per se* condemnation.[8] Although the Court found that the "infringement aspect, unknown elsewhere, except to some extent in the field of patents, makes the music industry *sui generis*" (562 F. 2d at 132), and that for some business purposes a blanket license might be desirable (*id.* at 140), the Court's price-fixing characterization and attendant *per se* analysis made unnecessary: the identification of all the potential anticompetitive effects of and countervailing justifications for blanket licensing; a balancing of the competitive effects; and a search for less restrictive alternatives.

2. We submit that the most accurate manner in which to assess the legality of ASCAP and BMI's blanket licensing practices relating to the television networks is to recognize the undisputed fact that the market reflects substantial deviations from the competitive norm. The thousands of music composers and publishers do not offer network users their works at prices subject to individual negotiation. They may compete by other means to ob-

8. This Court stated: "[o]ur objection to the blanket license is that it reduces price competition among the members and provides a disinclination to compete." 562 F.2d at 140. It is not clear to us whether the Court viewed the disinclination effect alone—apart from what it perceived as the price-fixing aspects of the blanket license—as an unreasonable restraint of trade.

tain network exposure for their individual works but, unlike sellers in a fully competitive industry, they do not seek to obtain exposure by lowering their prices. This deviation from the competitive norm is particularly significant in view of the district court's findings that for many purposes numerous musical compositions are relatively fungible for network use. 400 F. Supp. at 783, also 779. In such circumstances, it would be expected that composers of lesser reputation, or greater financial need at any given moment, would attempt to obtain network plays by engaging in price competition.

Another deviation from a competitive market may be manifested by the fact that, by charging a fee based on a percentage of advertising revenues (400 F. Supp. at 743), ASCAP has been able to obtain more money from the most successful network than from its rivals, despite the fact that success of a network relative to its rivals bears no relation to the amount of ASCAP music actually used under the blanket license.[9] In view of the relative fungibility of much music for many networks' [sic] uses, and the fact that the use by one network will not diminish the value of a song to the others, it is difficult to imagine how even the most successful of composers, on an individual basis, regularly could charge one network more than the others without pricing itself out of at least one third of the network market. Because of the indispensable nature of its collective repertory however, ASCAP knows that the network cannot readily take its business elsewhere, and can engage in price discrimination. Thus the price discrim-

9. The value of the music licensed by ASCAP certainly has no bearing on the relative success of the three networks since they all license the entire ASCAP and BMI repertory.

ination engaged in by ASCAP over the years may manifest collective market power exercised by ASCAP.[10]

In addition to the factually undisputed anticompetitive characteristics of the market which have developed while blanket licensing of the networks has taken place, there is the question whether the effect of the blanket license would make CBS's task of engaging in direct licensing more difficult or more costly. The district court's finding that copyright owners would not refuse outright to deal with CBS if CBS abandoned the blanket license (400 F. Supp. at 779) does not by itself preclude a finding that they might make the terms of direct dealing sufficiently onerous to frustrate CBS's efforts in that regard. Moreover, a finding that a feasible alternative to direct licensing exists does not preclude the possibility that ASCAP and BMI might be able to secure supra-competitive prices or impose unreasonably burdensome terms on their licenses in recognition of the economic barriers to direct dealing which the blanket license and its concomitant disinclination effect produce. In reviewing the district court's find-

10. Price discrimination exists when a seller or licensor charges different customers different prices for the same product or different products having the same costs of supply. *F. Scherer, Industrial Market Structure and Economic Performance,* 253 (1971); *L. Sullivan, Handbook of the Law of Antitrust* §29 (1978); II *P. Areeda & D. Turner, Antitrust Law* §514a (1978). In a competitive market, price discrimination cannot occur for any length of time because other sellers will divert the high profit sales until the differential is eliminated. *Sullivan, supra,* at 89; *Areeda & Turner, supra,* at 342. Price discrimination can occur only when three conditions exist: (1) the seller has market power, *i.e.*, some control over price; (2) customers can be segregated into discreet classes with different reservation prices or demand elasticities; and (3) there is an inability of customers paying lower prices to resell to those charged a higher price (a condition which is inherent in a market which deals with a license or a service). *R. Bork, The Antitrust Paradox* 377 (1978); *Scherer, supra,* at 253; 256 [sic]. Thus persistent price discrimination is evidence of a seller's market power. *Areeda & Turner, supra,* at 342.

ings, this Court previously stated that "on this record," taking into account "the strong bargaining power of CBS", it was not convinced that a blanket licensing system overhanging the market would necessarily affect the price of individual licenses. 562 F.2d at 140 n.27. The Court did not address the further question, however, of whether the cost of terminating the blanket license—with its attendant risks of securing direct licenses at economically feasible terms—is sufficiently high to enable ASCAP and BMI to take this termination penalty into account in setting fees for its blanket licenses. See Justice Stevens' dissent in *Broadcast Music, Inc.* v. *CBS, supra,* 99 S. Ct. at 1565-1567 & n.31. Further analysis of these questions on the basis of the record evidence seems called for.[11]

In any event, we submit that the undisputed evidence of certain noncompetitive market characteristics which

11. The district court found that ASCAP and BMI have neither the power to set prices nor the power to exclude competition (400 F. Supp. at 783), and that, not only did CBS fail to establish that ASCAP and BMI have the power to control price in a direct licensing market, but that defendants' power "to control the price even of their own blanket or per-program licenses is sharply curtailed under the [consent] decrees." *Id.* at 783. This discussion of defendants' "power" took place in the context of CBS's Section 2 monopoly claim, however. Since the power to cause price deviations from a competitive norm which signals concern for anticompetitive effects under Section 1 of the Sherman Act is far less substantial than the monopoly power required under Section 2, we do not know what the court's conclusions would have been if it had applied a proper Section 1 analysis to the undisputed fact of price discrimination and the evidence of leverage provided ASCAP by the costs of termination of the blanket license.

And while the district court concluded that CBS could, within a "reasonable" time, drop its blanket license by negotiating direct licenses for pre-packaged programs and securing limited per-program blanket licenses from ASCAP (400 F. Supp. at 765, 779-780), the court did not evaluate whether even minimal barriers to alternative licensing should or could be eliminated by use of a less restrictive form of blanket license.

have developed in the network licensing business while the blanket license has been in use impose the burden on the defendants to justify its continued use. We hasten to add that the findings of anticompetitive effects do not mandate a finding of illegality under the rule of reason. Rather, they require a showing by defendants[12] that procompetitive benefits attributable to use of a blanket license for the networks outweigh the anticompetitive effects and that the blanket license is no more restrictive than necessary to achieve the countervailing benefits.

3. Identification of procompetitive benefits attributable to the use of a blanket network license may be accomplished only by reviewing the evidence of record, a task which the United States, as *amicus*, has not presumed to undertake. We offer several observations relevant to the identification of procompetitive effects, however, in an effort to assist the Court.

First, the fact that a blanket license may promote competition with respect to other users of music, *e.g.* radio or TV stations, is not entitled to be weighed against anticompetitive effects in television networks licensing.[13] Thus, if television networks do not need a blanket license to obtain adequate idemnification, the fact that radio or TV stations may need such protection because of their spontaneous programming would not justify a competitive re-

12. But see note 5, *supra*.

13. The district court recognized that through the use of a blanket license ASCAP and BMI are able to generate transaction cost efficiencies not available in the case of individual transactions. *Id.* 400 F. Supp. at 742. Its opinion, however, does not explore the magnitude of these efficiencies in the context of the television network market.

straint on the television networks.[14] Similarly, if monitoring network use of music is found to be necessary to protect the copyrights of composers and publishers, the Court still must determine whether the necessary monitoring can be done without a blanket license. If it can, the procompetitive benefits of monitoring network use may *not* be attributed to the blanket license and weighed against the anticompetitive effects of such licenses. See discussion at pages 13-14, *supra*.[15]

14. It has not been argued that the benefits of broad indemnification, monitoring and reduced transaction costs to some users, *e.g.* radio stations, are dependent on inclusion of the television networks under a blanket license. Moreover, even if such an argument were advanced by ASCAP, it should be rejected for the antitrust laws do not allow sellers to impose competitive restraints on one distinct class of customers in order to benefit a different class of customers. Cf. *United States* v. *Philadelphia National Bank*, 374 U.S. 321, 370-371 (1963) (violation of Section 7 of the Clayton Act in local market is not excused by procompetitive effect in larger regional and national markets). Thus, the argument advanced by *amicus* Aaron Copeland, *et al* (Br. 22-32) that freeing the networks of a blanket license would amount to discriminatory subsidization beyond the province of the judiciary must be rejected. If the television networks have been deprived unreasonably of the benefits of competition by the effects of the blanket licensing system, they should not be required to continue subsidizing other ASCAP customers. The removal of such a competitive restraint, if found, hardly would constitute a usurpation of legislative functions by the judiciary, as *amicus* Aaron Copeland contends. To the contrary, it is the duty of the judiciary, charged, as it is, by Congress with enforcing the antitrust laws, to remove such competitive restraints.

15. Finally, it should be noted that all alleged benefits resulting from joint action are not entitled to equal weight in the balance against the joint action's anticompetitive effects. Those benefits that allegedly are necessary to create a market, in this case the monitoring by sellers and broad indemnification for users, are entitled to greater weight than benefits which reflect only cost savings. To countenance a significant restraint of competition for cost savings alone would constitute an improper judicial rejection of the congressional determination that, in the long run, greater competition provides the best means of lowering cost and spurring innovation. This does not mean that if transaction savings are so significant that, without them, a competitive market could not function they should not be considered.

Only after all the competitive effects, positive as well as negative, of blanket licensing to the televsion networks are explored, may this Court determine whether the licenses unreasonably restrain competition under a rule of reason analysis. If this Court chooses to make these additional findings itself, it should make clear which of the relevant district court findings it is adopting and which, if any, it finds to be clearly erroneous.

* * *

APPENDIX H

Excerpts from Brief for the United States as Amicus Curiae in *Columbia Broadcasting System, Inc.* v. *American Society of Composers, Authors and Publishers, et al.*, No. 80-323, Supreme Court of the United States (January 1981)

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

No. 80-323

COLUMBIA BROADCASTING SYSTEM, INC.,
Petitioner,

v.

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, *et al.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

* * *

This brief is filed in response to the Court's invitation to the Solicitor General to express the views of the United States.

STATEMENT

1. Since 1914, respondent American Society of Composers, Authors and Publishers (ASCAP) has acquired licensing rights from its author and composer members and has issued "blanket licenses" to various users. Similarly, respondent Broadcast Music, Inc. (BMI), which was formed by radio broadcasters in 1939 and remains broadcaster owned, also issues blanket licenses covering its entire musical repertory. Virtually each of the more than 4,000,000 domestic copyrighted musical compositions is in either ASCAP's or BMI's repertory. Respondents' blanket licenses, which usually are in effect for a one-year period, permit the licensee to use each and every composition within the repertory as often as desired for a fixed fee or for a percentage of the licensee's revenues. Neither ASCAP nor BMI directly grants licensees the option of obtaining performing rights on a per use, per composition basis. See Pet. App. E-2 to E-6.

The licensing activities of ASCAP and BMI are regulated by consent decrees dating back to 1941 (Pet. App. E-6). As modified by a 1950 amended decree (*United States* v. *ASCAP*, [1950-1951] Trade Cas. (CCH) para. 62,595 (S.D.N.Y. 1950)), ASCAP is required to "grant to any user making written application therefor a non-exclusive license to perform all of the compositions in the ASCAP repertory" (Para. VI). At the same time, members retain the right to license their works individually (Para. IV(B)). The decree forbids ASCAP from granting "to any user a license to perform one or more specified compositions in the ASCAP repertory, unless both the

user and member * * * shall have requested ASCAP in writing so to do * * *" or the copyright owner cannot be located within 30 days (Para. VI).

The decree permits ASCAP and licensees to negotiate any fee and any form of blanket license on which they can agree. It provides, however, that ASCAP must offer at least a "per program" blanket license,[1] the fee for which is based on income received for programs in which ASCAP music is played (Para. VII(B)). ASCAP must offer a "genuine economic choice" between per program and other licenses, and it is restrained from "requiring or influencing the prospective licensee to negotiate for a blanket license prior to negotiating for a per program license" (Para. VII(B)(3), (C)). If the parties are unable to agree on a mutually acceptable fee, the applicant may petition the United States District Court for the Southern District of New York for determination of a reasonable fee (Para. IX(A)). In such a proceeding, ASCAP has the burden of establishing that the fee it seeks to charge is reasonable (*ibid.*).

Like the ASCAP consent decree, the consent decree entered in *United States* v. *Broadcast Music, Inc.*, [1966] Trade Cas. (CCH) para. 71, 941 (S.D.N.Y. 1966), requires BMI to offer alternative forms of fee arrangements for blanket licenses (Para. VIII(B)). While other provisions of the decree differ from those in the ASCAP decree, the parties stipulated that petitioner could license directly from BMI affiliates with the same ease or difficulty as from ASCAP members (Pet. App. E-9 to E-10).

---

1. A "per program" blanket license enables the licensee to use any or all compositions in the repertory, as often as desired, for specified programs of the licensee (Pet. App. E-6 to E-7).

Since 1946, petitioner and the other television networks have negotiated blanket licenses with ASCAP and BMI (Pet. App. E-6, E-11, E-28). The fees under these licenses have been based on a percentage of the networks' total revenues and do not depend on the amount or distribution of music use (*id.* at E-16, E-11). Until this suit was filed in December 1969, CBS never had sought any other form of license from ASCAP, BMI, or their members (*id.* at E-27 to E-28).

2. In 1969, following unsuccessful negotiations regarding a renewed blanket license, petitioner filed this private antitrust action against respondents in the United States District Court for the Southern District of New York. Petitioner claimed that respondents' blanket licensing system, which is not based on actual use of specific compositions, violates Sections 1 and 2 of the Sherman Act, 15 U.S.C. 1 and 2, because it "compels" petitioner to pay royalties that are not based on actual music use. Petitioner principally contended that the blanket license is, in effect, an unlawful tying arrangement requiring petitioner to purchase the right to play music that it does not want in order to obtain the right to play music that it does want (Pet. App. E-10 to E-12). Critical to petitioner's tie-in theory was its alleged inability to obtain the music that it wanted (the tying product) from individual copyright owners (*id.* at E-11 to E-12). Petitioner further claimed that the pooling of license rights and the issuance of blanket licenses constitute price-fixing, a joint refusal to deal, and monopolization, in violation of Sections 1 and 2 of the Sherman Act, as well as copyright misuse (Pet. App. E-11).

Following an eight-week trial, the district court concluded that respondents' licensing activities do not violate

the antitrust or copyright laws, and it dismissed petitioner's complaint in its entirety (Pet. App. E-1 to E-98). The court first held that respondents' licensing arrangement does not constitute a *per se* violation of the antitrust laws because respondents' licensing authority is not exclusive. The court noted that, under the consent decree, the district court retains the ultimate power to set a reasonable fee for respondents' blanket licenses (*id.* at E-13 to E-21). With regard to the rule of reason and the copyright misuse claims, the district court viewed the dispositive question as one of compulsion: whether petitioner is coerced as a practical economic matter into taking a blanket license. The court found that petitioner had failed to prove the non-availability of alternatives to the blanket license and that, in fact, individual copyright owners "would wait at [petitioner's] door [to deal directly with it] if it announced plans to drop its blanket license" (Pet. App. E-89; see *id.* at E-15 to E-16, E-56 to E92).

3. The court of appeals affirmed the dismissal of all antitrust claims except one (Pet. App. D-1 to D-23). The court observed that, although the availability of individual licenses defeats petitioner's tie-in claim, it does not dispose of petitioner's price-fixing allegations (*id.* at D-8 to D-11). The court concluded that respondents are engaged in price-fixing, a *per se* violation of Section 1 of the Sherman Act, because the copyright owner's distributive share of the common royalties from respondents' licenses is not equal to the payment the owner would receive in a free market. Rather, the copyright owner's share is the result of at least a threshold elimination of price competition for the performing rights to the owner's musical composition (*id.* at D-11 to D-12). The court further stated, however, that

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"the blanket license need not be prohibited in all circumstances," since the record did not "compel a finding that the blanket license does not serve a market need for those who * * * deem [it] desirable" (*id.* at D-21 to D-22). Accordingly, the court of appeals remanded the case to the district court to fashion an appropriate remedy including both a blanket and a per use license (*id.* at D-21 to D-23).[2]

4. Thereafter, this Court granted respondents' petitions for a writ of certiorari to review the judgment of the court of appeals (439 U.S. 817 (1978)), and rejected the court of appeals' *per se* analysis (441 U.S. 1(1979), reprinted at Pet. App. C-1 to C-39). The Court first observed that respondents' licensing practices are *sui generis* and are subject to prior consent orders and continuing judicial and Department of Justice supervision (*id.* at C-6 to C-16). Viewed in this context, the Court found that "[t]he blanket license * * * is not a 'naked restrain[t] of trade with no purpose except stifling of competition,' * * * but rather accompanies the integration of sales, monitoring, and enforcement against unauthorized copyright use" (*id.* at C-20; citation omitted). The Court also concluded that the blanket license is a separate product, different from the license that any individual copyright owner can offer. That distinct product, the Court explained, serves the needs of both users and copyright owners, and by necessity must be marketed through an organization such as ASCAP or BMI, which necessarily has authority to negotiate a price regarding the blanket license (*id.* at C-20 to C-24). Because the blanket license is thus not "plainly anticompetitive" (*National Society of Professional Engineers* v.

2. Judge Moore concurred in the result but stated that he did not believe that respondents' licensing constituted price-fixing (Pet. App. D-23).

United States, 435 U.S. 679, 692 (1978)), the Court remanded the case to the court of appeals for an assessment under the rule of reason of respondents' licensing scheme in the context of the television industry (Pet. App. C-25 to C-26).[3]

5. On remand, the court of appeals held that it need not engage in an extensive rule of reason analysis because the trial court's original "findings of fact demonstrate that the blanket license has no anticompetitive effect at all" (Pet. App. A-8).[4] Although acknowledging that there is no price competition with respect to different songs (*id.* at A-10), the court of appeals concluded that this market characteristic is attributable to the apparent preference of users for blanket licenses in lieu of purchases of performing rights from individual copyright owners (Pet. App. A-10 to A-11). The court agreed with petitioner that "the blanket license cannot possibly be saved from illegality under § 1 simply because [petitioner] has the alternative of hiring composers to fill its needs for music * * * [and that a]n antitrust plaintiff is not obliged to pursue any imaginable alternative, regardless of cost or efficiency, before it can complain that a practice has restrained competition" (*id.* at A-12). The court nonetheless held that petitioner was free to buy performing rights from copyright owners but had chosen not to do so, and that, since "copyright owners retain unimpaired independence to set competitive prices for individual licenses to a licensee willing to deal with them, the blanket license is not a restraint of trade" (*ibid.*).

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3. Justice Stevens dissented from the remand, concluding that the "exclusive all-or-nothing blanket-license policy violates the rule of reason" (Pet. App. C-26).

4. The court of appeals concluded that this line of analysis had been left open by this Court's decision and remand order (Pet. App. A-9 to A-10).

Reviewing the proceedings in the district court, the court of appeals noted that the trial "concerned primarily the issue of whether direct licensing was feasible" (Pet. App. A-14). The court of appeals noted that the district court had found that there were feasible alternatives to the blanket license, and it held that "[t]hat ultimate finding is abundantly supported by subsidiary findings and by the record, which completely refute all of [petitioner's] allegations of barriers to direct licensing" (*ibid.*). In particular, the court of appeals found that the time and expense necessary to establish procedures to engage in wholesale direct licensing were not substantial barriers about which petitioner could complain (*id.* at A-14 to A-16). The court also concluded that petitioner had failed to prove that individual copyright owners would be disinclined to deal with it or would be likely to demand unconscionably high fees (*id.* at A-16 to A-17). Finally, the court of appeals noted that petitioner can renew its blanket license if that device proves to be preferable to individual negotiations (*id.* at A-17 to A-19).

DISCUSSION

The court of appeals has held that respondents' blanket licensing scheme has no anticompetitive effect because petitioner could readily seek to deal directly with individual copyright owners. Although we believe that the court of appeals' rule of reason analysis was too narrow, its decision appears to be predicated on the unique facts and procedural background of this case and does not establish any rule of general applicability.[5] Moreover, the decision be-

5. This Court's prior decision in this case established that the rule of reason, rather than a *per se* rule, is applicable (Pet. App. C-1 to

(footnote continued on next page)

low does not preclude future judicial supervision of respondents' licensing practices. Accordingly, further review by this Court is unwarranted.[6]

1. The court of appeals' conclusion that the blanket license has no anticompetitive effect rests on the district court's finding that petitioner was not economically compelled to negotiate for a blanket license. To be sure, that finding refutes petitioner's claim that the blanket license is an unlawful tying arrangement. But it does not necessarily follow that the existence of economic alternatives demonstrates that respondents' licensing scheme has no anticompetitive effect. Thus, even if individual copyright owners are willing to deal with petitioner, it is quite possible that the existing blanket license renders such negotiations more difficult or more costly, and that, as a result, respondents are able to charge a non-competitive fee for their licenses. Moreover, as we informed the court of appeals (Pet. App. H-15 to H-20), the undisputed facts in this case strongly suggest that the relevant market reflects substantial deviations from the competitive norm. See also *id.* at C-26 to

C-39). Decisions of this Court also have prescribed the mode of analysis to be followed in rule of reason cases. See *National Society of Professional Engineers* v. *United States*, 435 U.S. 679 (1978); *Continental T. V., Inc.* v. *GTE Sylvania, Inc.*, 433 U.S. 36 (1977); *Chicago Board of Trade* v. *United States*, 246 U.S. 231 (1918). The court of appeals recognized that these decisions required it to determine whether the agreement here in question "is on balance an unreasonable restraint of trade, that is, whether its anti-competitive effects outweigh its pro-competitive effects." Pet. App. A-8. At bottom, then, the question in this case is whether the court of appeals erred in applying settled legal principles to the facts of this particular case.

6. The United States has not attempted to review the entire district court record in this case. Our characterization of the evidence and proceedings below is based solely on the opinions in this case.

C-39 (Stevens, J., dissenting).[7] Hence, the court of appeals should have examined the relationship between these conditions and the challenged blanket licensing scheme and weighed the procompetitive aspects of respondents' licensing scheme against its apparent anticompetitive effects. See, *e.g.*, *Chicago Board of Trade* v. *United States*, 246 U.S. 231 (1918).[8]

We note, however, that the court of appeals' unduly narrow focus on the issue of economic compulsion appears to be attributable to petitioner's initial litigation strategy. In the district court, petitioner primarily relied on a tie-in theory that required it to prove that it was compelled to take the tied product (the unwanted music) in order to obtain the tying product (the desired music). See generally L. Sullivan, *Handbook of the Law of Antitrust* § 156 (1977). Accordingly, respondents' defense and the trial as a whole focused on the issue of compulsion rather than the other issues ordinarily addressed in a rule of reason case. And in the court of appeals' view, petitioner simply failed to establish its primary contention in support of its antitrust claims. In sum, the narrow focus of the court of appeals ap-

7. For example, there is no price competition among musical composers producing similar compositions, even though some composers are obviously more popular than others. Indeed, there is no existing market at all for individual performing rights. In addition, the fact that the fee for a blanket license is based on a percentage of network advertising revenues means that respondents are able to charge the more successful networks more money for the same product. Persistent price discrimination of this kind may indicate the presence of the market power of a cartel.

8. In the court of appeals, the United States suggested that it might be appropriate to remand the case to the district court for further examination of these issues (Pet. App. H-25).

parently reflects petitioner's own strategy and the limited evidence that it proffered in support of its own theories.[9]

2. Contrary to petitioner's contention (Pet. 18), the court of appeals did not hold "that all sellers in a given industry may pool their wares, have a committee of their members jointly sell requirements contracts to the pooled commodities or rights, and have that committee set the price of such contracts to each buyer." Rather, the court of appeals emphasized the unique nature of the market for musical compositions and petitioner's failure of proof, and it limited its opinion to the particular record before it (Pet. App. A-6 to A-8 & n.6, A-12, A-15 to A-19). See also *id.* at D-4 (court of appeals' first opinion described the music industry as "*sui generis*"). Indeed the court of appeals expressly noted that its decision did not address the legality of the use of respondents' licensing scheme in other markets (*id.* at A-8 n.6),[10] and did not foreclose future challenges to the blanket license in this market, should it prove to be a barrier to direct licensing (*id.* at A-17 to A-19).[11]

---

9. Petitioner argues (Pet. 22-27) that the court of appeals ignored or discounted certain evidence. But this Court ordinarily does not review the concurrent factual findings of the lower court. See, *e.g. Berenyi* v. *Immigration Director,* 385 U.S. 630, 635 (1967); *General Talking Pictures Corp.* v. *Western Electric Co.,* 304 U.S. 175, 178 (1938).

10. Such cases are now pending in the district court. See *Alton Rainbow Corp.* v. *ASCAP,* No. 78 Civ. 352 (S.D.N.Y.); *Buffalo Broadcasting Co.* v. *ASCAP.* No. 78 Civ. 5670 (S.D.N.Y.).

11. The consent decrees that govern the activities of ASCAP and BMI do not insulate them from future antitrust challenges. *Sam Fox Publishing Co.* v. *United States,* 366 U.S. 683, 690 (1961). As this Court pointed out in its prior decision in this case (Pet. App. C-12), the government and the judiciary "stand ready to provide further consideration, supervision, and perhaps invalidation of asserted anticompetitive practices."

Similarly, we cannot agree with petitioner's suggestion (Pet. 18-24) that the court of appeals has established a general rule that an otherwise unlawful agreement becomes lawful if the parties to the agreement retain a right of independent action. To be sure, the court of appeals repeatedly noted (Pet. App. A-11 to A-14) that petitioner had made no attempt to purchase licenses directly from copyright owners, who retained a right to deal independently with any potential licensee. But the court further recognized that "[a]n antitrust plaintiff is not obliged to pursue any imaginable alternative, regardless of cost or efficiency, before it can complain that a practice has restrained competition" (*id.* at A-12).[12] Moreover, as this Court explained in its prior decision in this case (*id.* at C-20 to C-23), respondents' licensing scheme is not a *per se* violation of the antitrust laws because the product offered by ASCAP and BMI is distinct from the product potentially offered by individual copyright owners and extends otherwise unavailable marketing advantages to both copyright owners and licensees. Nothing in the decision of the court of appeals suggests that a right of independent action would save typical price-fixing or other agreements that previously have been subject to challenge as *per se* violations.[13]

---

12. The court of appeals observed (Pet. App. A-10 to A-11, A-13) that petitioner's failure to seek direct licenses may be evidence that petitioner was not harmed by the blanket license, but rather preferred it. In the court's view, petitioner failed to present any evidence showing that significant barriers existed that would prevent it from seeking alternative arrangements. Such proof would have satisfied the evidentiary deficiency found by the court of appeals and would have required that respondents' licensing scheme be evaluated further under the rule of [sic]

13. The parties to every horizontal price-fixing agreement retain a "right" of independent action simply because the unlawful agreement is unenforceable. That right of independent action does not

(footnote continued on next page)

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

WADE H. MCCREE, JR.
Solicitor General

SANFORD M. LITVACK
Assistant Attorney General

ANDREW J. LEVANDER
Assistant to the Solicitor General

BARRY GROSSMAN
JOHN J. POWERS, III
ANDREA LIMMER
Attorneys

January 1981

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validate the agreement. Indeed, the agreement (or any conspiracy to fix prices) itself is a crime, even if the parties exercise a right of independent action and the agreement is never effectuated. See *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 224 n.59 (1940). Of course, if the court of appeals intended to establish a rule of general applicability on this point, its decision would be clearly wrong and appropriately subject to summary reversal. We do not, however, read the decision as having relevance to cases traditionally subject to the *per se* rule, or, indeed, as having relevance outside of the factual setting of this "*sui generis*" case.

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No. 84-910

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

BUFFALO BROADCASTING COMPANY, INC., et al.,
Petitioners,

—against—

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, et al., and BROADCAST MUSIC, INC., et al.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT BROADCAST MUSIC, INC. IN OPPOSITION

ROBERT J. SISK
One Wall Street
New York, New York 10005
(212) 709-7000
Attorney for Respondent Broadcast Music, Inc.

Of Counsel:

NORMAN C. KLEINBERG
MICHAEL E. SALZMAN
JACQUELINE D. GILBERT
WILLIAM H. VOTH
Hughes Hubbard & Reed
One Wall Street
New York, New York 10005

EDWARD W. CHAPIN
Broadcast Music, Inc.
320 West 57th Street
New York, New York 10019

QUESTION PRESENTED

Did the court of appeals err in holding that petitioners had failed to prove that the blanket licenses offered to local television stations were an unreasonable restraint of trade, where there was no evidence that those licenses restrained anyone from bargaining over the purchase and sale of performing rights to individual musical compositions?

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IN THE

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—against—

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, et al., and BROADCAST MUSIC, INC., et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT BROADCAST MUSIC, INC. IN OPPOSITION

Respondent Broadcast Music, Inc. ("BMI") submits this brief in opposition to the petition filed by Buffalo Broadcasting Company, Inc., et al. for a writ of certiorari to the United States Court of Appeals for the Second Circuit.[1]

STATEMENT OF THE CASE

Preliminary Statement

Petitioners ask this Court, in effect, to reconsider its earlier denial of the writ of certiorari sought by CBS in *Columbia*

1 In compliance with Supreme Court Rule 28.1, BMI states that it has no parent, subsidiary or affiliated corporations.

Broadcasting System v. American Society of Composers, Authors and Publishers, 450 U.S. 970 (1981), on precisely the same legal issues raised by petitioners here.[2]

Petitioners this time are five owners of local television stations, acting on behalf of a trade association called the All-Industry Television Station Music License Committee,[3] and a plaintiff class consisting of all United States commercial television station owners, other than CBS, NBC, and ABC.

Respondents are the two leading music performing rights societies, BMI and the American Society of Composers, Authors and Publishers ("ASCAP"), and two defendant classes, consisting of all copyright owners affiliated with BMI and members of ASCAP, respectively.

The blanket licensing practices at issue are identical to those in *BMI v. CBS*, 441 U.S. 1 (1979) ("*CBS*"), except that the licenses apply to non-network programs and are issued to individual stations rather than networks. The licenses "give the licensees the right to perform any and all of the compositions owned by the members [of ASCAP] or affiliates [of BMI] as often as the licensees desire for a stated term." *CBS*, 441 U.S. at 5. As in *CBS*, it is uncontested that BMI and ASCAP obtain only non-exclusive rights to the works in their repertoires, and that individual copyright owners remain free to license their musical works directly to music users outside of the blanket licenses.

---

2 While we are mindful that denial of a petition for a writ of certiorari does not constitute precedent as to issues raised by the petition, we think it is nonetheless significant that the issues raised here are identical to the issues raised by CBS and as to which these petitioners have already been heard as *amici curiae* in this Court. See *infra* at 3-4.

3 The Committee, which claims to represent all non-network owned television stations, was formed by the National Association of Broadcasters, and since 1949 has acted as the collective bargaining agent for all local stations in separate, periodic licensing negotiations with BMI and ASCAP. (Petitioners' Appendix ("Pet. App.") 43a.)

The *CBS* Precedent

Petitioners began this action in 1978, shortly after the Court of Appeals for the Second Circuit had held blanket licensing of CBS by BMI and ASCAP to be illegal *per se*. *CBS v. ASCAP*, 562 F.2d 130 (2d Cir. 1977). The local television broadcasters initially sought a *per se* ruling for themselves as well, contending both in their separate complaint and as *amici curiae* in this Court in *CBS* that the licenses involved price fixing and were not subject to the rule of reason. *See CBS*, 441 U.S. at 17 n.26. This Court however rejected the Second Circuit's *per se* analysis, pointing out that the blanket license was an additional product in the marketplace, with many efficient, pro-competitive characteristics:

> "The blanket license has certain unique characteristics: It allows the licensee immediate use of covered compositions without the delay of prior individual negotiations, and great flexibility in the choice of musical material."

Id. at 22 (footnote omitted).[4]

Indeed, the Court noted that such benefits would appear to be even more obvious for dispersed music users, such as local television stations, than for large networks:

> "With the advent of radio and television networks, market conditions changed, and the necessity for and advantages of a blanket license for those users may be far less obvious than is the case when the potential users are individual television or radio stations. . . ."

Id. at 21.

---

4 The Court also noted:

> "[The blanket license] reduces costs absolutely, . . . [is] sold only a few, instead of thousands, of times, and that obviates the need for closely monitoring the networks to see that they do not use more than they pay for. . . .
>
> "This substantial lowering of costs, which is of course potentially beneficial to both sellers and buyers, differentiates the blanket license from individual use licenses."

CBS, 441 U.S. at 21 (footnotes omitted).

The Court remanded the case to the Second Circuit for an assessment of the blanket license under the rule of reason. On remand, the local television stations appeared again as *amici curiae*, and took the position that the present case and *CBS* are indistinguishable:

> "I say, your Honor, it's the same license, and the same practice, and the same everything."

(Transcript of Oral Argument, *CBS v. ASCAP*, No. 75-7600 (2d Cir. Nov. 20, 1979) at 143-44.)[5]

The Second Circuit ruled against CBS, concluding that the network had failed to prove that the blanket license had any anti-competitive effect, since there was a "realistic alternative" to the blanket license available—*i.e.*, CBS "can feasibly obtain individual licenses from competing copyright owners. . . ." *CBS v. ASCAP*, 620 F.2d 930, 938 (2d Cir. 1980) ("*CBS-remand*").[6] Accordingly, the Second Circuit found it unnecessary to engage in any weighing of pro- and anti-competitive effects.

CBS petitioned this Court for review. The local stations again filed an *amicus* brief, supporting the contentions of CBS and urging the identical position set forth in their present petition.[7] This Court denied certiorari. 450 U.S. 970 (1981).

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5 Perhaps in recognition of the identity of legal issues, the Second Circuit granted petitioners the privilege, unusual for *amici*, of oral argument.

6 CBS had failed, among other things, to adduce any evidence that it had ever attempted to purchase performing rights from an individual composer, publisher, or television producer, or that music copyright owners would not respond to offers of competitive prices to have their works performed on network television.

7 Portions of the present petition are taken *in haec verba* from that brief.

Prior Proceedings

The results in *CBS* and *CBS-remand* precipitated a mid-course change of direction for these petitioners. Abandoning their price-fixing theme, they began sometime in 1980 a letter-writing campaign, directed by their litigation counsel, demanding (without offer of payment) that program syndicators clear the music in their programs "at the source." Petitioners' objective was to create a "paper record" that would establish the lack of a "realistic alternative" to the blanket license and thus avoid the strictures of the holding in *CBS-remand*.[8]

Following a bench trial, the district court (Lee P. Gagliardi, J.) ruled in petitioners' favor, holding that there were no realistically available alternatives to the blanket license. The district court purported not to rely on the results of petitioners' mid-litigation letter-writing gambit, finding that such evidence was:

> "so darkened by the shadow of the approaching trial that its results may not be relied upon to support either side."

(Pet. App. 76a.)[9] Rather, the decision rested almost entirely on the observation made by the judge on the first day of trial that "CBS is not [WIVB] in Buffalo." (Trial Transcript, Nov. 16, 1981, at 49.) Presumably the trial should have stopped at that point, since this insightful finding of fact led to the judge's dispositive economic analysis that the stations, lacking the market power of CBS, could not "pressure" or "compel" individual copyright owners or program producers into licensing performing rights individually and thus had no realistic alternative to the blanket license. (Pet. App. 73a, 78a.)[10] This

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8 See Pet. App. 28a, 30a.

9 Despite its acknowledgement that petitioners' evidence was fatally tainted, the district court faulted BMI and ASCAP for failing to rebut it, thereby improperly shifting the burden of proof to the defendants. (See Pet. App. 77a.)

10 The district court concluded: "[T]he major distinction between this case and *CBS* is that local stations do not have the market power or resources to compel source or direct licensing." (Pet. App. 70a n.36.)

conclusion, coupled with a confused analysis of the evidence and an impermissible shifting of the burden of proof, provided the basis for Judge Gagliardi's distinguishing of the *CBS* precedent.

The Second Circuit (Judges Newman, Winter, and Pratt) unanimously reversed, concluding:

> "the evidence was insufficient as a matter of law to show that the blanket license is an unlawful restraint of trade in the legal and factual context in which it currently exists."

(Pet. App. 4a.)

The court below reviewed the evidence relating to three alternatives to blanket licensing considered by the district court: (1) the per program licenses offered by BMI and ASCAP, (2) direct licensing by copyright owners, and (3) clearance "at the source" by program producers and syndicators. With respect to direct licensing and clearance at the source, the court of appeals rejected the trial court's "compulsion" theory of economics because "it disregards the functioning of a market." (Pet. App. 25a.) Instead, the court of appeals concluded that the lure of additional performances and profits would be sufficient to attract copyright owners and program producers and syndicators to these alternative licensing methods. The per program license was also held to be available as a transitional device for any station electing to switch partially from blanket licensing to individual licensing.[11]

The Second Circuit came to its conclusions after painstakingly evaluating the district court's treatment of the evidence, noting some 16 failures of proof on the petitioners' part, among which the following stand out:

- There was no "evidence that any local station ever offered any composer a sum of money in exchange for the performing rights to his music." (Pet. App. 24a);

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11 The per program licenses offered by BMI and ASCAP are full-repertoire licenses for which payment is made solely on the basis of revenues from programs actually using the licensed music. If the music is

- "The plaintiffs have not presented evidence to show that a brokering mechanism would not handle direct licensing transactions if the stations offered to pay royalties directly to copyright proprietors." (Pet. App. 26a);

- "Prior to bringing this lawsuit, the stations had not sought to obtain performing rights via source licensing." (Pet. App. 28a; footnote omitted);

- "Judge Gagliardi properly declined to give any probative weight to the plaintiffs' transparent effort to assemble in the midst of litigation evidence that they had seriously tried to obtain source licensing." (Pet. App. 30a);

- "There is no . . . finding as to what prices the [District] Court thought stations would have to offer to obtain source licensing. That is not surprising in view of the failure of the plaintiffs to present evidence to show either what such prices might be or that they would be 'premium' in the sense of significantly exceeding an objectively reasonable value of the rights obtained." (Pet. App. 31a);

- "Our task, in determining whether plaintiffs have presented evidence sufficient to support a conclusion that the blanket license is a restraint of trade, is not to psychoanalyze the sellers but to search the record for evidence that the blanket license is functioning to restrain willing buyers and sellers from negotiating for the licensing of performing rights to individual compositions at reasonable prices. Plaintiffs have simply failed to produce such evidence." (Pet. App. 32a);

- "[T]he evidence does not establish that barring the blanket license as to syndicated programs would add

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licensed by the copyright owner directly or at the source, no payment is due the performing rights society. (Pet. App. 10a-11a.)

any significant price competition among songs that the blanket license allegedly prevents. . . . [I]t is entirely a matter of speculation whether replacement of the blanket license with source licensing would add any significant increment to price competition at the point where the syndicators decide which music to use." (Pet. App. 34a); and

- "Since the blanket license restrains no one from bargaining over the purchase and sale of music performance rights, it is not a restraint unless it were proven that there are no realistically available alternatives. . . . [T]he plaintiffs did not present evidence to establish the absence of realistic alternatives." (Pet. App. 35a).

In concurring below, Judge Winter expressed the hope that the extensive scrutiny of blanket licensing of music in *CBS, CBS-remand*, and the instant case would discourage future litigation over the legality of such licensing, noting:

> "The result of this scrutiny has been to demonstrate that so long as composers or producers have no horizontal agreement among themselves to refrain from source or direct licensing and there is no other artifical barrier, such as a statute, to their use, a non-exclusive blanket license cannot restrain competition. In those circumstances, it is simply one alternative competing on the basis of price and services with others."

(Pet. App. 37a.)

The stations' petition for rehearing containing a suggestion for rehearing en banc was denied without any judge requesting that a vote be taken. (Pet. App. 102a-03a.)

SUMMARY OF ARGUMENT

Petitioners were unsuccessful in their *amicus* efforts to secure a different result in *CBS*, and identical deficiencies in proof have caused them to be unsuccessful in this tag-along action. Their efforts to relitigate the denial of CBS' certiorari petition are unworthy of this Court's consideration.

The Second Circuit's decision is not only consistent with *CBS*, but also with two later opinions of this Court: *NCAA v. Board of Regents*, 104 S. Ct. 2948 (1984), and *Arizona v. Maricopa County Medical Society*, 457 U.S. 332 (1982). Those decisions explicitly distinguish non-exclusive blanket licenses from horizontal agreements limiting competition and confirm that the test adopted by the Second Circuit is the appropriate threshold examination. Both decisions place emphasis on the fact that under the blanket licenses offered by BMI and ASCAP "each individual remained free to sell his own music without restraint." *NCAA*, 104 S. Ct. at 2968; *see Maricopa*, 457 U.S. at 355. The decision below is also consistent with other copyright and patent pooling cases in this Court and the courts of appeals.

Petitioners are unable to cite a single case which questions, criticizes, or disapproves the Second Circuit's application of the rule of reason in *CBS-remand* or the present case. Nor can they point to any case incorrectly decided as a result of a court's reliance on the Second Circuit opinions. On the occasions when parties engaged in anti-competitive conduct have attempted to fit within the "no restraint" language of *CBS-remand*, courts have had no trouble making the necessary distinctions.

ARGUMENT

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED.

I. PETITIONERS' EFFORTS TO REARGUE THE PRECEDENTS CREATED IN THE *CBS* LITIGATION DO NOT MERIT CONSIDERATION BY THIS COURT.

This Court in *CBS* determined that the law governing an antitrust challenge to the identical license and practices at issue here is the rule of reason. The content of a rule of reason analysis is familiar and settled law for which no further treatment by this Court is warranted.

Petitioners argue here, however, as they did in *CBS*, that the Second Circuit failed to carry out the mandate of this Court and did not apply the rule of reason correctly to the evidence presented. Although this evidentiary issue can scarcely be considered one of profound importance or far-reaching effect, the fact remains that petitioners are wrong in this assertion.[12]

Their argument amounts to nothing more than a play on words and an attempt to relitigate here the result in *CBS-remand*.[13] The court of appeals made clear in its opinions in this

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12 The petition here seeks review only on the issue of whether the court of appeals applied the correct legal standard in conducting its rule of reason analysis of the local station blanket license. Petitioners do not seek review of, or contest, the court of appeals' conclusions that the various alternatives to the blanket license were, as a matter of fact, available.

13 The Second Circuit, they say, erred in *CBS-remand* by creating a new test which requires proof at the threshold that the challenged practice "restrains" trade. The petitioners claim that there must have been a restraint here, citing Justice Brandeis' words in *Chicago Board of Trade v. United States*, 246 U.S. 231, 238 (1918), that "[e]very agreement concerning trade, every regulation of trade, restrains." This argument is pure casuistry. Justice Brandeis was distinguishing between "restraint" in the layman's sense and "restraint of trade" as an antitrust term of art. In the latter sense, he explained, restraint refers only to activity which has an adverse effect on competition. *Cf.*

case and in *CBS-remand* that, when it found no restraint, it was concluding that plaintiffs had failed to prove any adverse effect on competition among individual copyright owners. The court below considered in *CBS-remand* whether this Court's mandate to examine the blanket license under the rule of reason left it free to entertain the contention that the blanket license has no anti-competitive effect at all. 620 F.2d at 934. In concluding that it was free to deal with this argument, the Second Circuit pointed to this Court's statement that it was " 'uncertain whether the practice on its face has the effect . . . of *restraining* competition among the individual composers.' " *Id.* at 935 (quoting *CBS*, 441 U.S. at 13) (emphasis added).[14]

The Second Circuit then examined CBS' proof (and the arguments of these petitioners as *amici*) to see whether in fact the blanket license had "restrained" such competition—*i.e.*, whether it had any adverse effect on the availability of individual licenses from competing composers. Balancing of pro- and anti-competitive effects was not necessary in *CBS-remand*, since there was nothing negative to weigh against the obvious advantages of the license.

In dealing with the separate claims of the local television stations in the instant litigation, the court below did not rest its decision on the record in *CBS-remand*, but independently evaluated all of the evidence introduced by petitioners relating to the effects of the blanket license on the behavior in the local television market of copyright owners, television syndicators, and these petitioners. It also reviewed the origin of the licenses,

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Standard Oil Co. v. United States, 221 U.S. 1, 56 (1911). It was obviously in the familiar antitrust sense that the court of appeals found there to be no restraint here and in *CBS-remand*.

14 In addition, the court of appeals in *CBS-remand* cited as precedents supporting this conclusion *Automatic Radio Mfg. Co. v. Hazeltine Research, Inc.*, 339 U.S. 827 (1950), and *Standard Oil Co. (Indiana) v. United States*, 283 U.S. 163 (1931), in which blanket licenses covering patent pools were upheld under the rule of reason on the ground that licensees had not been foreclosed by the pooling arrangements from the option of obtaining licenses for the individual patents. 620 F.2d at 936.

the history of litigation concerning them, the implications of the consent decrees applicable to both BMI and ASCAP, and the significance of the separate rights of synchronization and public performance provided by the Copyright Act.

The reversal of the trial court's decision, however, was based on the identical failure of proof of restraint in this case as in *CBS-remand*. Like CBS, the individual stations had never genuinely attempted to contact individual composers, publishers, or clearance agents for music performing rights; they had never asked program producers or syndicators to "clear" such rights before delivering programs to the stations; and they had never sought to make use of the per program license alternative. And like the network, they had no evidence that composers and publishers were using the blanket license to mask a horizontal agreement among themselves to refrain from direct or source licensing.

In its extensive discussion of the evidence, the court below was engaged in traditional rule of reason analysis, and its conclusion that the evidence was insufficient as a matter of law to require further evaluation of the license and practices in issue was entirely consistent with the mandate in *CBS*. Nothing has occurred in the four years since this Court denied certiorari in *CBS* to warrant renewed consideration of the *CBS* legal issues.

II. THE DECISION BELOW FOLLOWS THE DECISIONS OF THIS COURT AND APPLIES THE APPROPRIATE RULE OF REASON ANALYSIS.

As shown in Point I, the Second Circuit's use of the "no restraint" phraseology to refer to the lack of any anti-competitive effect was borrowed from the opinion of this Court in *CBS*, and its use has subsequently been endorsed by later decisions of this Court dealing with that opinion. *See Arizona v. Maricopa County Medical Society, supra*, 457 U.S. 332, and *NCAA v. Board of Regents, supra*, 104 S. Ct. 2948.

In *Maricopa*, the Court was confronted with a maximum price fixing feature of a medical care plan run by two medical societies. Faced with the defendants' contention that this restraint, like the BMI and ASCAP blanket licenses, constituted price fixing "only in the literal sense," the Court stated:

> "The so-called 'blanket license' was entirely different from the product that any one composer was able to sell by himself. Although there was little competition among individual composers for their separate compositions, the blanket-license arrangement *did not place any restraint* on the right of any individual copyright owner to sell his own compositions separately to any buyer at any price."

457 U.S. at 355 (footnotes omitted; emphasis added). And in support of this "no restraint" reading of *CBS*, the *Maricopa* Court cited this key passage from *CBS*:

> " 'The individual composers and authors have neither agreed not to sell individually in any other market nor use the blanket license to mask price fixing in such other markets.' "

Id. at 356 n.32 (quoting 441 U.S. at 23-24).

Because the doctors in the medical plan had not combined to offer a new product different from the sum of their individual services (like the blanket license), but had instead agreed to set the maximum prices they would charge in their individual practices, the *CBS* precedent was distinguishable, and the plan was found to be *per se* illegal.[15]

In the *NCAA* case, certain member schools of the NCAA challenged the association's television plan for college football games, which restricted the number and identity of games to be

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15 The dissent in *Maricopa* argued that the medical plan did create a new product, like the blanket license, and therefore should not be condemned as illegal *per se*. 457 U.S. at 365 n.12. It also pointed to the fact that physicians were free to deal with other insurers, to treat patients not participating in the plan, or to quit the plan after a year. *Id.* at 360. The dissent is, thus, consistent with Judge Newman's reading of *CBS* as well.

broadcast and the fees to be paid to the schools for the broadcasts. Finding these restrictions unjustified by any redeeming pro-competitive virtues, the Court concluded that the plan was illegal under the rule of reason.

As a threshold question, the Court considered whether the existence of the NCAA plan actually restrained the conduct of the individual schools. The Court concluded:

> "And, of course, since as a practical matter all member institutions need NCAA approval, members have *no real choice* but to adhere to the NCAA's television controls.[31]
>
> "The anticompetitive consequences of [the NCAA] arrangement are apparent. *Individual competitors lose their freedom to compete*. Price is higher and output lower than they would otherwise be, and both are unresponsive to consumer preference.
>
> ---
>
> "31. Since, as the District Court found, NCAA approval is necessary for any institution that wishes to compete in intercollegiate sports, the NCAA has a potent tool at its disposal for *restraining* institutions which require its approval."

104 S. Ct. at 2963-64 & n.31 (citations and certain footnotes omitted; emphasis added).[16] Distinguishing the *CBS* case from that of the NCAA, this Court described the music performing rights market as one in which, despite the existence of the blanket license, "each individual remained free to sell his own

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16 In contrast, in the case at bar, individual copyright owners retain their freedom to compete with each other outside the blanket license (Pet. App. 35a); there was no proof that prices for music performing rights under the blanket license are higher than in individually-negotiated transactions (Pet. App. 31a, 34a); the district court found, as did both sides' economic experts, that the blanket license does not restrict output (Pet. App. 82a; Trial Transcript, Dec. 10, 1981, at 1473; Trial Transcript, Dec. 14, 1981, at 1994); and there was no proof that the prices of music performing rights are unresponsive to consumer preferences (Pet. App. 34a-35a).

music *without restraint*." 104 S. Ct. at 2968 (emphasis added).[17]

These passages are consistent with the Court's observation in *CBS* that the network "had a real choice" as to whether to take the blanket license, 441 U.S. at 24, and with the Second Circuit's holding in *CBS-remand* that the existence of such a "real choice" determined whether or not competition had been adversely affected.

The Second Circuit's analysis is also supported by decisions of other courts of appeals. *See, e.g., Los Angeles Memorial Coliseum Commission v. National Football League*, 726 F.2d 1381, 1389 n.3 (9th Cir.), *cert. denied*, 105 S. Ct. 397 (1984); *F.E.L. Publications, Ltd. v. Catholic Bishop*, 214 U.S.P.Q. 409 (7th Cir.), *cert. denied*, 459 U.S. 859 (1982); *K-91, Inc. v. Gershwin Publishing Corp.*, 372 F.2d 1 (9th Cir. 1967), *cert. denied*, 389 U.S. 1045 (1968).

Petitioners' argument that Judge Newman failed to perform a rule of reason analysis in *CBS-remand* was explicitly considered and rejected in *Los Angeles Memorial Coliseum Commission*:

> "On remand in *Broadcast Music* the Second Circuit did not conclude, as the NFL claims, that rule of reason analysis was unnecessary. It found only that it was unnecessary to balance the pro and anticompetitive effects of the blanket licensing arrangement because no anticompetitive effects were proven."

726 F.2d at 1389 n.3.

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17 Similarly, the Court observed that:

> "By participating in an association which prevents member institutions from competing against each other on the basis of price or kind of television rights that can be offered to broadcasters, the NCAA member institutions have created a horizontal restraint—*an agreement among competitors on the way in which they will compete with one another.*"

104 S. Ct. at 2959 (emphasis added; footnote omitted). In the instant case, no such agreement was proved or exists.

In *F.E.L. Publications*, the plaintiff suing for copyright infringement was a music publisher which had amassed a large repertoire of copyrighted hymns. The publisher offered to license the sheet music copying rights to the songs under a blanket license, and also under per-copy licenses. In response to an antitrust counterclaim, the Seventh Circuit explicitly relied on the Second Circuit's opinion in *CBS-remand* to uphold the publisher's blanket licenses, concluding:

> "[T]he ACL [Annual Copying License] does not restrain trade or have anti-competitive effects if an alternative opportunity to acquire rights to individual songs is fully available."

214 U.S.P.Q. at 415.

Finally, in *K-91*, a radio station attacked the legality of the ASCAP blanket license under the antitrust law. As one of its grounds for its holding in favor of ASCAP, the Ninth Circuit stated:

> "ASCAP's licensing authority is not exclusive. The right of the individual composer, author or publisher to make his own arrangements with prospective licensees, and the right of such prospective licensees to seek individual arrangements, are fully preserved."

372 F.2d at 4.

III. THE SECOND CIRCUIT'S DECISIONS BELOW AND IN *CBS-REMAND* CAN HAVE, AND HAVE HAD, NO ADVERSE EFFECT ON ANTITRUST ENFORCEMENT.

The Second Circuit's opinions below and in *CBS-remand* cannot have, and have not had, an adverse impact on antitrust enforcement. They are just two rule of reason cases, concerned with a *sui generis* product, where plaintiffs failed to meet the burden of proof. If they stand for any general proposition at all, it is that sometimes a plaintiff may present such meager evidence of anti-competitive effect that no evaluation of offsetting pro-competitive benefits is required. This is a truism, and

it cannot possibly hinder antitrust enforcement for courts and prospective plaintiffs to recognize it to be the law.[18]

Petitioners are unable to cite a single decision which criticizes, questions, or disapproves the Second Circuit's application of the rule of reason in *CBS-remand* or in the present case. While antitrust practitioners have, in a number of cases, attempted to use the BMI-ASCAP precedents to justify conduct which illegally restrained competition, the lower courts have had no difficulty making the relevant distinctions.

For example, in *United States v. Columbia Pictures Industries*, 507 F. Supp. 412 (S.D.N.Y. 1980), *aff'd mem.*, 659 F.2d 1063 (2d Cir. 1981), four motion picture companies and an oil company proposed to set up a joint venture in the cable television business. The venture would have had exclusive television performing rights to the output of the four studios for the first nine months after the movies were released. The studios argued that they were creating a new product, like the BMI and ASCAP blanket licenses. The district court rejected this contention (made by the attorneys for petitioners herein), noting that the exclusive relationship between the venture and the studios was altogether different from the BMI-ASCAP arrangements in which individual composers remained free to license their own works to anyone at any price. 507 F. Supp. at 427 & n.42. The district court therefore issued a preliminary injunction against the proposed venture.

Similarly, in *General Cinema Corp. v. Buena Vista Distribution Co.*, 532 F. Supp. 1244 (C.D. Cal. 1982), and *North American Soccer League v. National Football League*, 505 F. Supp. 659 (S.D.N.Y. 1980), *aff'd in part and rev'd in part*, 670 F.2d 1249 (2d Cir.), *cert. denied*, 459 U.S. 1074 (1982), cited by petitioners (Pet. 25), defendants were unsuccessful in convincing the courts that the Second Circuit's opinion in *CBS-remand* provided them with any defense.

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18 As this Court stated last Term, quoting an article by Professor Areeda, " 'the rule of reason can sometimes be applied in the twinkling of an eye.' " *NCAA v. Board of Regents, supra*, 104 S. Ct. at 2965 n.39 (quoting P. Areeda, *The "Rule of Reason" in Antitrust Analysis: General Issues* (Federal Judicial Center 1981), at 38).

CONCLUSION

The petition for a writ of certiorari should be denied.

New York, New York
January 9, 1985

Respectfully submitted,

Robert J. Sisk
One Wall Street
New York, New York 10005
(212) 709-7000

Attorney for Respondent
Broadcast Music, Inc.

Of Counsel:

Norman C. Kleinberg
Michael E. Salzman
Jacqueline D. Gilbert
William H. Voth
Hughes Hubbard & Reed
One Wall Street
New York, New York 10005

Edward W. Chapin
Broadcast Music, Inc.
320 West 57th Street
New York, New York 10019

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

BUFFALO BROADCASTING COMPANY, INC., et al.,
Petitioners,

—against—

AMERICAN SOCIETY OF COMPOSERS,
AUTHORS AND PUBLISHERS, et al.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, et al. IN OPPOSITION

JAY TOPKIS
345 Park Avenue
New York, New York 10154
(212) 644-8000

—and—

BERNARD KORMAN
One Lincoln Plaza
New York, New York 10023
(212) 595-3050

Attorneys for Respondents American Society of Composers, Authors and Publishers, et al.

ALLAN BLUMSTEIN
ANDREW J. PECK
RICHARD H. REIMER
PAUL, WEISS, RIFKIND, WHARTON & GARRISON

Of Counsel

QUESTION PRESENTED

Whether the Court of Appeals erred in determining that the petitioning local television stations failed to prove that the ASCAP blanket license was an unreasonable restraint of trade under Section 1 of the Sherman Act because they failed to prove the absence of real alternatives to the blanket license?

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BUFFALO BROADCASTING COMPANY, INC., et al.,

Petitioners,

—against—

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND COURT

BRIEF FOR RESPONDENTS AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, et al. IN OPPOSITION

STATEMENT OF THE CASE

In the courts below, petitioners alleged that the blanket license offered by ASCAP unreasonably restrained trade in violation of Section 1 of the Sherman Act.

This was not a new issue. In 1979, this Court held that the blanket license was not *per se* illegal—reversing a decision of the Court of Appeals, *BMI* v. *Columbia Broadcasting System, Inc.*, 441 U.S. 1 (1979), *reversing* 562 F.2d 130 (2d Cir. 1977) ("*CBS*"). On remand, in 1980, the Court of Appeals held that the blanket license was not anti-competitive and did not restrain trade at all, in view of the availability of direct licensing from copyright owners, a route which CBS had never ex-

plored, 620 F.2d 930 (2d Cir. 1980), *cert. denied*, 450 U.S. 970 (1981) ("*CBS Remand*").

In the courts below, everyone agreed that the decisions in *CBS* and *CBS Remand* were the controlling legal precedents. The District Court determined that the blanket license was unlawful under Section 1 of the Sherman Act and banned its use for local television stations. The Court of Appeals reversed, holding that petitioners had failed to prove their case. The evidence, said the court, was insufficient as a matter of law to prove that petitioners lacked the real choices of dealing either with ASCAP via a "per program" license, or with ASCAP's members, or with producers of syndicated programs to acquire music performing rights.

The Parties[1]

Petitioners

Each of the five named petitioners owns one or more television stations; they were certified by the District Court to represent the owners of the approximately 750 stations in the nation, except for the five stations owned by each of the three national television networks, ABC, CBS and NBC.

Petitioners come in all sizes. Some are small stations in rural areas. But they also include major corporate enterprises—for example, Metromedia, Inc., which owns seven stations, including WNEW in New York, KTTV in Los Angeles, WCVB in Boston and WTTG in Washington, D.C., and receives more revenue from its broadcasting operations than any owner other than the three networks.

Since 1949, nearly all stations have been represented in their dealings with ASCAP by the All-Industry Television Station

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1 Pursuant to Rule 28.1 of this Court's Rules, the following information identifies the parent companies, subsidiaries (except wholly owned subsidiaries) and affiliates of the ASCAP respondents which are corporations: Famous Music Corp.—Gulf & Western Industries, Inc. (parent).

Music License Committee (the "All-Industry Committee"), which retained petitioners' counsel here and which has funded this action.

Petitioners' Programming

The local stations have three principal sources of programming: network, syndicated and locally produced.

Some 600 of the approximately 750 stations are affiliated with one or more networks and broadcast programs originated by the networks during much of the broadcast day. The performing rights for music contained in network programs are licensed by the networks from ASCAP and Broadcast Music, Inc.; these rights are not involved in this case.

"Syndication" means distributing programs to individual stations. "Syndicated programs" include feature-length films; programs produced originally for network broadcast, but later made available for local broadcast ("M*A*S*H," "I Love Lucy," "All in the Family"); and programs produced originally for syndication (game shows, "The Merv Griffin Show," etc.).

Locally-produced programming means programs originated by the stations: principally news, sports and talk shows.

Petitioners' Music Use

The focus of the proceedings below was on the music used in syndicated programs. The vast majority of syndicated programs are delivered to the station by the producer or syndicator in recorded form on film or tape. Virtually all these programs contain theme or background music—some contain "feature" music, such as a song sung by a performer on camera.

Under the Copyright Law, the local stations which broadcast these syndicated programs—and thus perform the music—need music performing rights to avoid being infringers.

ASCAP

ASCAP and its members offer the local stations the opportunity to acquire music performing rights.

ASCAP is an unincorporated membership association, formed in 1914 by composers, lyricists, and publishers to license its members' performing rights under the Copyright Act. ASCAP licenses today on behalf of its more than 20,000 writer and 7,000 publisher members.[2]

Ever since 1941, ASCAP has operated under the strictures of an antitrust decree filed in the Southern District of New York in *United States* v. *ASCAP.* In 1950, by agreement between the Antitrust Division and ASCAP and with the approval of the court, the decree was amended quite extensively as to broadcasting, [1950-51] Trade Cas. (CCH) ¶ 62,595 (S.D.N.Y. 1950).

The "Amended Final Judgment," as it is known, requires ASCAP to offer a "per program" license to any broadcaster wishing one. Under the local television station per program license, fees are payable only for programs which use ASCAP music not licensed directly by ASCAP's members. Hence, if the program does not use ASCAP music, or if the ASCAP music used is licensed to the station directly by ASCAP members, the station pays no fee.

The decree permits ASCAP to offer a blanket license—under this form of license the fee is based upon all station revenues, including revenues from programs which contain no ASCAP music, or is a flat fee. But ASCAP may issue such a license *only* when the broadcaster explicitly so *requests* and ASCAP is required to structure its fees so that the prospective licensee shall have a "genuine" choice between the different licenses.

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2 ASCAP, a non-profit enterprise, also licenses on behalf of the hundreds of thousands of members of some 40 affiliated foreign societies which, similarly, license for ASCAP members in their countries. After deducting its operating expenses, ASCAP distributes all of its revenues among its members and affiliated foreign societies, in accordance with surveys of the frequency with which their copyrighted compositions are performed.

Under the Amended Final Judgment, if ASCAP and the broadcaster are unable to agree on a fee, the broadcaster may apply to the District Court for the determination of a reasonable fee for either the blanket or per program form of license, with ASCAP bearing the burden of proving reasonableness.

Most users in this country have always preferred to obtain the blanket license. Indeed, blanket licenses are used throughout the world by performing rights societies in all countries which recognize copyright.

As this Court noted in *CBS*, the last litigation involving ASCAP to reach this Court (441 U.S. at 20):

> "ASCAP and the blanket license developed together out of the practical situation in the market place: thousands of users, thousands of copyright owners, and millions of compositions. Most users want unplanned, rapid and indemnified access to any and all of the repertory of compositions, and the owners want a reliable way of collecting for the use of their copyrights. Individual sales transactions in this industry are quite expensive, as would be individual monitoring and enforcement, especially in light of the resources of single composers. . . . [T]he costs are prohibitive for licenses with individual radio stations, nightclubs and restaurants, . . . and it was in that milieu that the blanket license arose."

However, if any local television station desires to seek licenses from individual copyright owners, or to request producers of syndicated programs to seek such licenses and thereafter to convey performing rights to the broadcaster, it is free to do so. Under the Amended Final Judgment, each member grants to ASCAP only the *nonexclusive* right to license performances. The member retains the right to license directly.

The availability of the blanket license, therefore, does not restrain trade, in the customary understanding of the term: it does not narrow the arteries of commerce, or eliminate alterna-

tives. As this Court pointed out in *CBS*, 441 U.S. at 21-22, the blanket license is an *additional* alternative made available to users of music:

> "The blanket license is composed of the individual compositions plus the aggregating service. Here, the whole is truly greater than the sum of its parts; it is, to some extent, a different product."

Thus, since 1950—since the birth of a commercially viable television industry—the local stations have had at least the following options for acquiring performing rights for music created by ASCAP's members: an ASCAP blanket license (at an agreed upon or judicially determined fee); an ASCAP per program license (at an agreed upon or judicially determined fee); direct dealings with copyright owners; or dealings with producers or syndicators of syndicated programming, who would, in turn, acquire performing rights from copyright proprietors and convey those rights to the stations.

Licensing History

For more than 35 years, the local stations have exercised only one of those options: with only a handful of exceptions down through the years, stations have regularly obtained ASCAP blanket licenses. And, as a result of negotiations between their All-Industry Committee and ASCAP, the effective rate they have paid as a license fee for the blanket license has regularly gone down.

In 1949, when the first fee-bearing blanket license between ASCAP and the local stations was negotiated,[3] the agreed upon fee was 2.5% of the revenues derived by the stations from non-network programs.

In 1954, the parties reached a new agreement: the blanket rate was reduced to 2.05%. (They agreed also on a per

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3 ASCAP first licensed television broadcasters in 1941. At the explicit request of the industry, ASCAP gave the stations a gratuitous blanket license which was in effect until 1948.

program rate of 9% of the revenues from each program using ASCAP music; only a handful of stations took the per program license and in a few years the number dropped to zero.)

In 1957, the licenses were extended by agreement through 1961. The parties reached their next agreement in 1969, after the local stations failed in litigation contending that the Amended Final Judgment obligated ASCAP to issue a specially-tailored license which excluded syndicated programs. *United States* v. *ASCAP* (Application of *Shenandoah Valley Broadcasting, Inc.*), 208 F. Supp. 896 (S.D.N.Y. 1962), *aff'd*, 331 F.2d 117 (2d Cir.), *cert. denied*, 377 U.S. 997 (1964).

The 1969 settlement had, in essence, two provisions: first, the broadcasters agreed that ASCAP's blanket and per program licenses were lawful. In a consent order, the parties jointly advised the District Court of their agreement that "such forms of license agreement may be entered into lawfully [by them]." Second, ASCAP agreed to a sharp rate reduction: the blanket rate was dropped to 2% of the average of 1964-65 revenues, and only 1% on incremental revenues.

As the Court of Appeals wrote in its decision below (14a)[4]:

> "The All-Industry Committee reported to the stations that this rate reduction would save them approximately $53 million through 1977, an estimate that was exceeded because of the rapid growth of station revenue."

These facts—petitioners' representation to the District Court in 1969 that the blanket license is "lawful," in exchange for a rate reduction that subsequently saved them tens of millions of dollars—surely suggest that their alleged injury is imagined, not real.

The new license agreements, with extensions, ran through November 30, 1978.

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4 References are to the appendix to the petition for a writ of certiorari.

In the 1970's, the *CBS* litigation was proceeding apace. In 1977, the Court of Appeals held the blanket license to be *per se* illegal, 562 F.2d 130—a decision which was reversed by this Court in 1979, 441 U.S. 1. But, as the Court of Appeals noted here, "[p]erhaps encouraged by the 1977 ruling in favor of CBS, the local stations began this litigation in [November] 1978" (14a).[5]

Proceedings Below

Petitioners contend here that the ASCAP blanket license violates Section 1 of the Sherman Act—thus petitioners blithely reneged on their representation to the court in 1969 that the blanket license is lawful. (In the courts below, it was our contention that these facts required application of the doctrine of judicial estoppel to bar petitioners from contending that the blanket license was unlawful. The District Court's opinion did not mention this claim, and the Court of Appeals "move[d] past" the argument to consider "the merits of the dispute" (16a).)

The bench trial in the District Court took place in 1981. With the opinions in *CBS* and *CBS Remand* as the controlling precedents, the trial had as its principal focus the availability to petitioners of marketing alternatives to the blanket license.

The District Court Opinion

The District Court held the blanket license unlawful. It found that, as to syndicated programs, the broadcasters had no realistically available alternatives to the blanket license—neither through the per program license, nor by direct dealing with ASCAP members, nor by asking the producers to obtain performing rights and deliver them to the broadcasters (64a-78a).

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5 The All-Industry Committee thereafter participated as an *amicus* in all subsequent stages of the *CBS* litigation. It filed a brief in this Court; on remand, it filed a brief in the Court of Appeals and its counsel was permitted to participate in the oral argument; it then filed a brief urging rehearing by the Court of Appeals and then a brief in this Court urging the grant of certiorari.

The Court of Appeals Decision

The Court of Appeals unanimously reversed. It determined that petitioners had failed to prove their case (4a):

> "[W]e conclude that the evidence was insufficient as a matter of law to show that the blanket license is an unlawful restraint of trade in the legal and factual context in which it currently exists."

The court first found an "absence of evidence" that the "program license has been artificially priced higher than is reasonable for value received"; this barred any conclusion that the "program license is 'too costly' to be a realistic alternative" (22a).

Turning to direct licensing, the court noted the absence of "any evidence that any local station ever offered any composer a sum of money in exchange for the performing rights to his music." The court added (24a):

> "That evidentiary gap exists despite the 21-year interval between entry of the Amended Final Judgment and the trial of this case, during which the local stations had ample opportunity to determine whether performing rights could be directly licensed."

Finally, with regard to source licensing, the court, after considering the arguments tendered by petitioners that "reluctant" syndicators could not be "compelled" to engage in such transactions, concluded (32a):

> "Our task, in determining whether plaintiffs have presented evidence sufficient to support a conclusion that the blanket license is a restraint of trade, is not to psychoanalyze the sellers but to search the record for evidence that the blanket license is functioning to restrain willing buyers and sellers from negotiating for the licensing of performing rights to individual compositions at reasonable prices. Plaintiffs have simply failed to produce such evidence."

On this issue, however, the court considered petitioners' efforts, beginning in mid-1980, long after this lawsuit was started, "to create a paper record designed to show the unavailability of source licensing" (28a). Agreeing with the trial court, the Court of Appeals (30a)

> "declined to give any probative weight to the plaintiffs' transparent effort to assemble in the midst of litigation evidence that they had seriously tried to obtain source licensing."

The transparency of this effort—and the light it casts on the extent to which petitioners failed to prove their case—is best shown by the almost farcical evidence petitioners offered at the trial as to the happenings at Metromedia, Inc.:

Metromedia, in addition to being a major broadcaster, owns a subsidiary, Metromedia Producers Corp. ("MPC"), the fourth-ranking producer of first-run syndicated programming. To create evidence for the trial of this lawsuit, lawyers representing Metromedia and MPC decided that Metromedia should ask MPC to obtain music performing rights for the MPC programs broadcast on Metromedia's stations. The request was made by one Metromedia lawyer addressed to another Metromedia lawyer representing MPC. The latter was also Metromedia's representative on the All-Industry Committee. After discussing his proposed response with petitioners' counsel, MPC's lawyer wrote back to Metromedia's other lawyer that it would be "difficult, if not impossible" for MPC to clear performing rights for Metromedia's stations. This correspondence was then filed only in Metromedia's legal department, in a special file created for this lawsuit; it saw the light of day when it was offered at trial to prove the "reluctance" of syndicators to engage in source licensing.

After a review of this incident and the other record evidence, the Court of Appeals concluded (36a):

> "[W]e hold that the local television stations have not presented evidence in this case permitting a conclusion that the blanket license is a restraint of trade in violation of section 1."

REASONS FOR DENYING THE WRIT

I.

The Narrow Factual Holding Of The Court Below Presents No Question Of General Importance Warranting Review By This Court

The Court of Appeals did not decide an important question of federal law that requires further review. It held only that petitioners failed to prove their case.

Petitioners' failure below was all the more striking because it came after the Court of Appeals' decision in *CBS Remand* pointing out the parallel failure in CBS' claim of antitrust illegality.

Unlike the 1977 decision of the Court of Appeals in *CBS*, which did serious mischief to the antitrust laws by misapplying the *per se* doctrine, the decision now sought to be reviewed involves only narrow factual issues based on a particular record and particular plaintiffs in what this Court has recognized as the *sui generis* world of music performing rights licensing, 441 U.S. at 10.

The decision below does no mischief and creates no turmoil—just as the *CBS* decision by this Court and the *CBS Remand* decision by the Court of Appeals have done no mischief and created no turmoil.

Applying the same mode of analysis as it did in *CBS Remand*, the court below found a failure of evidentiary proof. Deciding no novel, general or important legal issues, the court held simply that petitioners failed to prove the facts supporting the allegations of illegal conduct made in their complaint.

Nothing in the opinion below offends any antitrust rule of general applicability. The court below recognized—as it did in *CBS Remand*—that " '[a]n antitrust plaintiff is not obliged to pursue any imaginable alternative, regardless of cost or efficiency, before it can complain that a practice has restrained competition' " (17a-18a).

Since petitioners failed to prove that they lacked real choices in dealing with ASCAP, or its members, or syndicators, the court ordered the complaint dismissed. It was reinforced in its view by this Court's recent decision in *NCAA* v. *Board of Regents of the University of Oklahoma*, 104 S. Ct. 2948 (1984).

In short, this is another suit by users of ASCAP music who failed at trial—like CBS failed—to prove that they lacked real choices. It is an inappropriate vehicle for any further review by this Court of the function and effects of the blanket license offered to music users.

Finally, to deny certiorari here is not to leave users of ASCAP music without a remedy if they should come forward with real evidence that they have been abused. Ample means exist for consideration and resolution of issues concerning the licensing of performing rights to copyrighted music. This Court's opinion in *CBS* pointed out that (441 U.S. at 13):

> "[T]he Federal Executive and Judiciary have carefully scrutinized ASCAP and the challenged conduct, have imposed restrictions on various of ASCAP's practices, and, by the terms of the [consent] decree, stand ready to provide further consideration, supervision, and perhaps invalidation of asserted anticompetitive practices."

II.

The Decision Below Does Not Conflict With The Mandate Of This Court In CBS

The Court of Appeals here made an appropriate rule of reason assessment—just as it made an appropriate rule of reason assessment in *CBS Remand*. It concluded that petitioners simply failed to prove their case—its primary inquiry was into the nature and competitive effects of the alleged restraint. It found that petitioners had failed to prove, in the market context of the local television industry, that the blanket

license had any anticompetitive effect. Nothing further was required.

Petitioners' grievance, if any, derives from the factual weakness of their case, not from any justified objections to the legal rulings made by the court below.

Indeed, it would appear that petitioners' real quarrel is with this Court's refusal in *CBS* to find the blanket license *per se* illegal. Petitioners point to this Court's recognition in *CBS* that the blanket license constitutes literal "price fixing," 441 U.S. at 9, and "the [license] fee is not set by competition among individual copyright owners," 441 U.S. at 23. Of course, in *CBS* this Court also said (441 U.S. at 23-24):

> "[T]he blanket license cannot be wholly equated with a simple horizontal arrangement among competitors. ASCAP does set the price for its blanket license, but that license is quite different from anything any individual owner could issue. The individual composers and authors have neither agreed not to sell individually in any other market nor use the blanket license to mask price fixing in such other markets. Moreover, the substantial restraints placed on ASCAP and its members by the consent decree should not be ignored. The District Court found that there was no legal, practical or conspiratorial impediment to CBS's obtaining individual licenses; CBS, in short, had a real choice."

In any event, it is hard to see how any further inquiry into the effects of the blanket license could be productive for petitioners. For example, this Court, in *CBS*, viewed both transaction and monitoring cost savings from the blanket license as inevitable and significant, even for a single television network; *a fortiori*, for 750 local television stations. The Court said (441 U.S. at 21):

> "But even for television network licenses, ASCAP reduces costs absolutely by creating a blanket license that is sold only a few, instead of thousands, of times, and that

obviates the need for closely monitoring the networks to see that they do not use more than they pay for."

Moreover, in *NCAA*, *supra*, this Court noted (104 S. Ct. at 2961, 2968):

> "*Broadcast Music* squarely holds that a joint selling arrangement may be so efficient that it will increase sellers' aggregate output and thus be procompetitive."
>
> * * *
>
> "In *Broadcast Music*, the availability of a package product that no individual could offer enhanced the total volume of music that was sold. . . . [T]here was no limit of any kind placed on the volume that might be sold in the entire market and each individual remained free to sell his own music without restraint."

Here, the District Court found as an "undeniable fact that the blanket license does not restrict output; indeed, the blanket license encourages the use of music by eliminating marginal costs once the license is purchased" (82a).

III.

The Decision Below Does Not Conflict With Decisions Of Other Circuits

Petitioners have failed to demonstrate any conflict with decisions of other circuits. In view of the narrow and limited factual nature of the holding below, this is hardly surprising.

The fact that other circuits, in totally different factual contexts, have engaged in other and different kinds of *factual* analysis is not conflict. There is no conflict on the pertinent *legal* principles.

Indeed, the decision below is wholly in harmony with decisions in other circuits. See *K-91, Inc.* v. *Gershwin Publishing Corp.*, 372 F.2d 1 (9th Cir. 1967), *cert. denied*, 389 U.S. 1045 (1968); *BMI* v. *Moor-Law, Inc.*, 527 F. Supp. 758 (D. Del.

1981), *aff'd mem.*, 691 F.2d 490 (3d Cir. 1982); *F.E.L. Publications, Ltd.* v. *Catholic Bishop of Chicago,* 1982-1 Trade Cas. (CCH) ¶ 64,632 (7th Cir.), *cert. denied,* 459 U.S. 859 (1982).

CONCLUSION

The petition for a writ of certiorari should be denied.

Dated: New York, New York
January 9, 1985

Respectfully submitted,

JAY TOPKIS
345 Park Avenue
New York, New York 10154
(212) 644-8000

—and—

BERNARD KORMAN
One Lincoln Plaza
New York, New York 10023
(212) 595-3050

Attorneys for Respondents American Society of Composers, Authors and Publishers, et al.

ALLAN BLUMSTEIN
ANDREW J. PECK
RICHARD H. REIMER
PAUL, WEISS, RIFKIND, WHARTON & GARRISON

Of Counsel

No. 84-910

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

BUFFALO BROADCASTING COMPANY, INC., KID BROADCASTING CORPORATION, KWTX BROADCASTING COMPANY, INC., METROMEDIA, INC. and STORER BROADCASTING COMPANY, On Behalf Of Themselves and All Persons or Entities Who Own Local Television Stations Which Obtain Music Performance Rights Pursuant to Music License Agreements With American Society of Composers, Authors and Publishers and/or Broadcast Music, Inc.,

Petitioners,

—against—

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, STANLEY ADAMS, as President of American Society of Composers, Authors and Publishers, CY COLEMAN, HAL DAVID, FAMOUS MUSIC CORP., MCA, INC., MORTON GOULD, SHAPIRO, BERNSTEIN & CO., INC., On Behalf of Themselves and All Other Members of American Society of Composers, Authors and Publishers, BROADCAST MUSIC, INC., AL GALLICO MUSIC CORP., PAUL ANKA, JERRY BOCK, SHELDON HARNICK, HOLLIS MUSIC, INC., and UNART MUSIC CORP., On Behalf of Themselves and All Other Affiliates of Broadcast Music, Inc.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS AL GALLICO MUSIC CORP., SHELDON HARNICK, HOLLIS MUSIC, INC., UNART MUSIC CORP. AND THE CLASS OF AFFILIATES OF BROADCAST MUSIC, INC. IN OPPOSITION

Of Counsel:

WILLIAM HUGHES MULLIGAN
TIMOTHY A. NELSEN
DANIEL F. DE VITA

SKADDEN, ARPS, SLATE,
MEAGHER & FLOM

January 9, 1985

BARRY H. GARFINKEL
919 Third Avenue
New York, New York 10022
Tel: (212) 371-6000
Counsel for Respondents Al Gallico Music Corp., Sheldon Harnick, Hollis Music, Inc., Unart Music Corp. and the Class of Affiliates of Broadcast Music, Inc.

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Respondents Al Gallico Music Corp., Sheldon Harnick, Hollis Music, Inc., Unart Music Corp. and the class of all persons or entities from which Broadcast Music, Inc. ("BMI") has obtained the right to license performing rights to third parties (the "BMI affiliates") respectfully request that this Court deny the petition for a writ of certiorari seeking review of the judgment of the United States Court of Appeals for the Second Circuit, entered on September 18, 1984, in this case.* The judgment of the Court of Appeals reversed the judgment of the United States District Court for the Southern District of New York, entered on January 4, 1983. The opinion of the Court of Appeals is reported at 744 F.2d 917 and is set forth at Appendix A to the petition at 1a-39a. The opinion of the District Court is reported at 546 F. Supp. 274 and is set forth at Appendix B to the petition at 40a-86a.

REASONS WHY THE PETITION SHOULD BE DENIED

The respondent class of BMI affiliates joins in the brief of respondent BMI in opposition to the petition for a writ of certiorari and urges that the petition be denied.

In addition, the BMI affiliates note that, in both the District Court and the Court of Appeals, the BMI affiliates interposed substantial defenses to petitioners' claims which were separate and distinct from the defenses raised by BMI or the American Society of Composers, Authors and Publishers. At the level of the Court of Appeals, the BMI affiliates' separate defenses included, among others, the following:

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* Pursuant to Rule 28.1 of the Rules of the Supreme Court, the following information identifies the parent companies, non-wholly owned subsidiaries and affiliates of the representatives of the respondent BMI affiliates. Al Gallico Music Corp. has subsidiaries named Mainstay Music, Inc. and Mainspring Music, Inc. Unart Music Corp. was owned by United Artists Corp. at the time this action was commenced. In 1981, United Artists Corp. was sold to Metro-Goldwyn-Mayer Film Co. (now MGM/UA Entertainment Co.). In 1983, Unart Music Corp. was dissolved.

1. Since the District Court made no finding that any BMI affiliate (a) entered into any contract, conspiracy or combination in restraint of trade or (b) took any action which caused the offering by BMI of the blanket license (the alleged restraint of trade), the BMI affiliates did not violate Section 1 of the Sherman Act, 15 U.S.C. § 1.

2. Since petitioners failed to prove at trial either (a) the alleged common issue upon which the tentative certification of the defendant class of all BMI affiliates was based (ie. that each BMI affiliate "split" the licensing of performing rights and synchronization rights by granting only synchronization rights to program producers) or (b) the liability of any BMI affiliate, the defendant class should have been decertified or dismissed.

3. The District Court's conclusory declaration that the BMI affiliates were guilty of copyright misuse was unsupportable by law and unsupported by any finding of fact.

The BMI affiliates believe each of their defenses to be sound, and believe they would prevail on their defenses even should the blanket license offered by BMI be found to be a restraint of trade. However, having ruled that the blanket license did not constitute a restraint of trade, the Court of Appeals did not find it necessary to rule on the separate defenses raised by the BMI affiliates. Accordingly, the BMI affiliates request that any disposition, other than denial, of the petition under consideration take into account the existence of their substantial unresolved defenses.

CONCLUSION

For the reasons set forth in respondent BMI's brief in opposition, the petition for a writ of certiorari should be denied.

Dated: New York, New York
January 9, 1985

Respectfully submitted,

BARRY H. GARFINKEL
919 Third Avenue
New York, New York 10022
Tel: (212) 371-6000
Counsel for Respondents Al Gallico Music Corp., Sheldon Harnick, Hollis Music, Inc., Unart Music Corp. and the Class of Affiliates of Broadcast Music, Inc.

Of Counsel:

WILLIAM HUGHES MULLIGAN
TIMOTHY A. NELSEN
DANIEL F. DE VITA

SKADDEN, ARPS, SLATE, MEAGHER & FLOM

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IN THE

Supreme Court of the United States

October Term, 1984

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Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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REPLY BRIEF FOR PETITIONERS

Ira M. Millstein
767 Fifth Avenue
New York, New York 10153
(212) 310-8000
Counsel of Record

Of Counsel:

James W. Quinn
R. Bruce Rich
Kenneth L. Steinthal
Lois Peel Eisenstein
Martin J. Silverman

Weil, Gotshal & Manges

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REPLY BRIEF FOR PETITIONERS

The ASCAP and BMI briefs ("ASCAP Opp."; "BMI Opp.") concede that the Court of Appeals' "rule of reason" analysis in this case never went beyond deciding that there was no "restraint of trade" because the local stations theoretically had alternatives to the blanket license (ASCAP Opp. 12; BMI Opp. 11). They also acknowledge that, despite this Court's mandate that the blanket license be subjected to "discriminating examination" under the rule of reason, *BMI* v. *CBS*, 441 U.S. 1 (1979), the Court of Appeals decided that it did not have to go beyond a "threshold" examination of whether there was any "restraint at all" and did not, accordingly, undertake the traditional rule of reason weighing of all the other pro- and anti-competitive effects of the challenged agreement in its market context (BMI Opp. 9). Assuming the legal correctness of the Court of Appeals' truncated analysis only of "alternatives," respondents characterize this case as involving merely a failure of proof on the part of the stations with respect to their ability to escape the harmful effects of the blanket license.

Respondents have thus joined petitioners in framing the pure legal issue here presented to this Court: As a matter of law, did the Court of Appeals err by, now concededly, failing to weigh all of the pro- and anti-competitive consequences of the blanket license as required by the rule of reason?

It is one thing to say that the potential for self-help (alternatives) is an element to be weighed among many others in balancing under the rule of reason. It is another, and clearly unprecedented and erroneous, to say that such a potential will, if it is arguably present, foreclose any consideration of all of the other pro- and anti-competitive consequences of a practice weighed in its market context.

The significance of this conceded major revision of the rule of reason, let alone the definition of restraint of trade, was described in our petition. Such error, compounded by the Court of Appeals' disregard of this Court's command that respondents' licensing practices be subjected to searching competitive scrutiny, without more, clearly warrants review by this Court. Nevertheless, we shall herein specifically respond to respondents' contentions that this case

presents "no novel, general or important legal issues" (ASCAP Opp. 11); that this case is but a "re-run" of the *CBS* litigation (ASCAP Opp. 13; BMI Opp. 10); and that the result below may be attributed to a simple failure of proof by petitioners (ASCAP Opp. 11; BMI Opp. 6).

1. *There was no "traditional" rule of reason inquiry below; the Court of Appeals did not follow this Court's mandate in CBS.* Conspicuously absent from respondents' submissions is any discussion of the *undisputed* evidence both in this case and in *CBS* of the substantial anti-competitive effects of the blanket license. Respondents thus totally ignore: this Court's findings in *CBS* that the blanket license constitutes literal "price fixing" by direct competitors and "concerted action in a large and active line of commerce," 441 U.S. at 9, 10; Justice Stevens's recognition that the blanket license has a "significant adverse impact on competition" in a market "that could be highly competitive but is not," *id.* at 26, 33; the Government's conclusions in *CBS* that respondents' blanket licensing practices reflect "substantial deviations from the competitive norm," inflict "[p]ersistent price discrimination," and manifest "the market power of a cartel" (Pet. App. 128a-129a & n.7); and the District Court's determination in the instant case, following a four-week trial, that with respect to the local television stations the blanket license "insulates [composers] . . . from price competition" and stifles the development of marketplace alternatives that would permit such price competition to take place (Pet. App. 58a).

These findings of substantial anti-competitive effects led this Court in *CBS* to remand for a "discriminating" examination of the overall competitive implications of the network blanket license under the rule of reason. 441 U.S. at 24. Indeed, they were sufficiently weighty to cause the Court to declare that the blanket license "may not ultimately survive" such examination. *Id.* In the instant case, such findings, coupled with a careful assessment of asserted pro-competitive benefits in the relevant market context, led the District Court to conclude that the anti-competitive consequences of the blanket license in this market so plainly outweighed any pro-competitive virtues as to

warrant an injunction against the blanket license in its application to the stations' syndicated programming.

Seemingly oblivious to these undeniable anti-competitive consequences of the blanket license, respondents assert that the Court of Appeals was justified in confining its competitive inquiry to the issue of "available alternatives," and in equating an asserted failure of proof by the stations that they lacked means of escape with the absence of *any* anti-competitive effects. Notwithstanding such a truncation of the competitive inquiry, respondents term the Court of Appeals' mode of analysis "appropriate" and "traditional" and "consistent with [this Court's] mandate in *CBS*" (ASCAP Opp. 12; BMI Opp. 12). Respondents' arguments are completely devoid of merit.

a. As the cases discussed in the petition (pp. 14-18, 24-25) make clear, it is unprecedented for a court to require the victims of an anti-competitive arrangement to bear the threshold burden of proving that there were no alternatives to which they could resort as a prerequisite to finding that arrangement to be a "restraint" under the Sherman Act warranting evaluation of all significant competitive consequences. Such a legal requirement would allow market arrangements including those, as here, foreclosing price competition among competitors enjoying significant market power, to go wholly unreviewed for their competitive implications. The development of such a rule, focusing exclusively on victim self-help, would effectively nullify the purposes of the antitrust laws: to assess the real-world effects of agreements among competitors on economic markets.

The record in the instant case amply demonstrates the untoward potential of such a rule: respondents' practices have been proven to eliminate price and quality competition; to impose persistent price discrimination; and to generate consumer dissatisfaction among an entire class of users.[1] All of this was irrelevant to the Court of Appeals.

1. Contrary to respondents' claim that the local stations have historically favored the blanket license (ASCAP Opp. 6-8), the trial record clearly established that the stations have sought for more than 30 years to secure competitive alternatives and, frustrated in that pursuit, have, at most, "only acquiesced in the development and maintenance of the blanket licensing system." (Pet. App. at 66a-68a).

All that mattered was that the local stations had, in the Court of Appeals' view, potential means of escape.[2]

Respondents do not come to grips with the petition's demonstration (pp. 16-18) that the Court of Appeals' rule would wreak havoc with a wide array of rule of reason and *per se* cases. Such consequences, emanating from such an important center of commerce as the Second Circuit, are, however, inevitable. The mere assertion (ASCAP Opp. 11; BMI Opp. 16) that what is here at issue is the "*sui generis* world of music performing rights licensing" does not limit the logic or language of the Court of Appeals' rationale—which has already been utilized by defendants in wholly unrelated industries as a means of avoiding searching competitive scrutiny of their conduct. (Pet. 25)[3]

b. Contrary to respondents' suggestions (ASCAP Opp. 12; BMI Opp. 10), nothing in the reasoning of this Court in *CBS* even remotely approves the mode of legal analysis adopted by the Court of Appeals. To the contrary, having acknowledged the serious anti-competitive potential of respondents' licensing practices, and having recognized that those practices "might not survive" searching competitive analysis in particular market contexts, this Court in *CBS* quite clearly contemplated that the blanket license would be subjected, when challenged, to the traditional weighing

2. It may well be true, as BMI suggests (BMI Opp. 16-17), that when presented with "meager evidence of anti-competitive effect," there are some instances in which the rule of reason can be applied "in the twinkling of an eye." But plainly this is not such a case. Where defendants comprise virtually all sellers in the market, do not compete with one another, engage in massive and persistent price discrimination, and cause consumer dissatisfaction with their pricing practices, a "quick look" will not suffice. The need for a searching competitive scrutiny of ASCAP's and BMI's practices has, of course, already been recognized by this Court in *CBS*, and by the Department of Justice in its *amicus* briefs. Indeed, the District Court's searching examination in this case, like that undertaken by Justice Stevens in *CBS*, merely confirms the blatant anti-competitive effects of the blanket license.

3. That few courts to date have been persuaded, on the facts presented, to follow the Second Circuit's reasoning (BMI Opp. 17) is beside the point. It should be noted, however, that one case cited by respondents, *F.E.L. Publications, Ltd.* v. *Catholic Bishop of Chicago*, 214 U.S.P.Q. 409 (7th Cir. 1982), appears to have adopted *in toto* the Second Circuit's rationale in connection with different marketing practices—involving print publication rights.

of its pro- versus anti-competitive effects in particular market applications. The Court plainly did not intend that the blanket license should be subjected to such scrutiny only after a user first has proven that it has attempted, and failed, to obtain licensing alternatives. This point is evident from the *CBS* opinion itself. CBS was found by this Court to have had "a real choice" between the blanket license and other alternatives. 441 U.S. at 24. That, however, did *not* dissuade the Court from remanding the case for a full evaluation of the blanket license's competitive effects.

As Justice Stevens pointed out, the availability of practical alternatives was an appropriate factor to be considered in the Court's determination that the blanket license is not *per se* illegal. *Id.* at 29. But it is certainly not the dispositive factor in any rule of reason analysis. *Id. See, e.g., Kentucky Fried Chicken Corp.* v. *Diversified Packaging Corp.*, 549 F.2d 368, 381 (5th Cir. 1977). In the instant case, even were the Court of Appeals correct in its factual analysis concerning availability of alternatives (*see* discussion below at 7-9), the numerous and substantial anti-competitive effects of the license found by the District Court and the lack of offsetting pro-competitive benefits in this market context were more than sufficient to condemn respondents' licensing practices even in the face of such alternatives.

This Court's decisions in *Arizona* v. *Maricopa County Medical Society*, 457 U.S. 332 (1982) and *NCAA* v. *Board of Regents*, 104 S. Ct. 2948 (1984), lend no support to respondents' contentions that the truncated rule of reason analysis adopted by the Court of Appeals is consistent with this Court's mandate in *CBS* (BMI Opp. 12). To the contrary, in *Maricopa* this Court reiterated that "the rule of reason requires the fact finder to decide whether under all the circumstances of the case" a challenged practice is on balance pro- or anti-competitive, 457 U.S. at 343—relying on Justice Brandeis's classic articulation of the comprehensive nature of the factual inquiry mandated under the rule of reason. *Id.* at 343 n.13 (quoting *Chicago Board of Trade* v. *United States*, 246 U.S. 231, 238 (1918)). Likewise, in *NCAA* the Court engaged in a broad rule of reason examination of all aspects of the challenged television plan—

including its effect on prices and "consumer preference," noting that the latter factor is "perhaps the most significant." 104 S. Ct. at 2964.

While BMI refers to the Court's discussion in those cases of certain features of the blanket license which took the license out of the category of *per se* illegality, including the non-exclusive licensing rights possessed by ASCAP and BMI (BMI Opp. 12-14), neither such discussion nor anything else in the *CBS* opinion supports the conclusion that the blanket license lacks any anti-competitive effect merely because it technically leaves composers and publishers free to enter into individual licensing arrangements. The Court's instructions to subject the blanket license to the "discriminating examination" of the rule of reason are wholly inconsistent with such a reading. Indeed, were such a licensing option viewed by the Court as dispositive of the competitive inquiry, the Court would have upheld the physicians' maximum price-fixing scheme in *Maricopa*, rather than finding the arrangement blatantly anti-competitive and *per se* illegal, since the doctors, like the copyright owners in this case, had complete freedom to negotiate individually and charge less than the fixed rates. 457 U.S. at 341.[4]

2. *Respondents' attempt to equate the local stations' case to a vast network case.* ASCAP and BMI repeatedly contend that this case is but a "re-run" of *CBS* (ASCAP Opp. 13; BMI Opp. 10), raising no new legal issues warranting resolution by this Court. While it is true that the Court of Appeals first adopted the erroneous restraint standard here challenged in *CBS Remand*, the factual and legal posture of the *CBS* litigation when brought to this Court for review was, as noted in the petition (pp. 9, 22-23), vastly different from that of the instant case. CBS had asserted a "tie-in" or "coercion" theory that it could not substantiate at trial. The stations here relied on no such coercion theory, but instead tried a traditional rule

4. Nor do other previously-decided music performing rights decisions (ASCAP Opp. 14) lend support to respondents' position. *K-91, Inc.* v. *Gershwin Publishing Corp.*, 372 F.2d 1 (9th Cir. 1967), predates *CBS* and is of doubtful continuing validity. *BMI* v. *Moor-Law, Inc.*, 527 F.Supp. 758, 765 (D. Del. 1981), *aff'd mem.*, 691 F.2d 490, 491 (3d Cir. 1982), on the other hand, properly construed this Court's *CBS* opinion to require close examination of all competitive effects of the blanket license.

of reason case in which all of the competitive consequences of the blanket license in this market were explored.

The Solicitor General, sharply disagreeing with the Second Circuit's mode of analysis in *CBS Remand* and its failure to address the obvious anti-competitive effects of the blanket license, nevertheless advised this Court that the panel's decision in that case could be justified based solely on the peculiar record which had been developed by CBS. (Pet. App. 129a). Notably, however, the Solicitor General further advised that any extension of the holding in *CBS Remand* to other market contexts (such as has now occurred in this case) would warrant "summary reversal" by this Court.[5] (*Id.*, 131a n.13).

3. *The so-called failure of proof.* Relying on the narrow "restraint" formulation of the Court of Appeals, respondents proceed to characterize this case as one involving, at most, a "failure of proof" on the part of the stations (ASCAP Opp. 11; BMI Opp. 6). Of course, these alleged failures of proof relate to the issue erroneously viewed as dispositive by the Court of Appeals—the availability of alternatives. While BMI is in error in claiming (BMI Opp. 10 n.12) that petitioners do not dispute the correctness of the Court of Appeals' conclusions on this issue (*see* discussion below), petitioners do assert that the Court of Appeals' exclusive focus on this issue constitutes a fundamental misapprehension of the rule of reason worthy of review by this Court. Respondents' characterization of this case as involving mere insufficiencies of proof accordingly is wide of the mark: had the Court of Appeals properly conducted a full rule of reason analysis and considered, not merely the purported availability of alternatives, but also the totality of evidence concerning the blanket license's effect on competition in the relevant market, it would have had to conclude—as did the District Court based on a full review of all relevant evidence—that

5. The trial record developed in this case demonstrates the totally different market circumstances confronting the multitude of individual broadcasters located across the nation in comparison to those confronting CBS, "the giant of the world in the use of music rights." 441 U.S. at 4. (Pet. App. 70a). There is, in this case, a particularly great need to protect over 750 relatively small and widely dispersed consumers against the aggregated market power—subsuming virtually all sellers in the market—exercised by ASCAP and BMI.

the challenged application of the blanket license violates the Sherman Act.

Notwithstanding its subsidiary importance in a rule of reason case such as this, the improper manner in which the Court of Appeals reviewed the evidence on the issue of "available alternatives" deserves brief discussion. The District Court here, following the Court of Appeals' direction in *CBS Remand,* carefully examined the issue of whether individual local television stations enjoyed realistically available marketing alternatives to the blanket license. Following a four-week bench trial, the taking of testimony from seven witnesses from the television industry, six composer and music publisher witnesses, and four expert witnesses, and review of a record including extensive documentary exhibits and deposition testimony, the court found as a matter of fact that none of the three purportedly available alternative licensing mechanisms was practically available to the stations. (One of these three, producer "source licensing," was recognized by the District Court as potentially providing a competitive and highly efficient market alternative to the blanket license, but the court found that the stations were unable to obtain such a licensing alternative so long as the blanket license remained in effect.) The District Court's opinion repeatedly refers to the "uncontroverted" facts and data supporting its factual findings and contrasts respondents' failure to present any evidence of any kind with respect to many of them.[6] (Pet. App. 51a n.11, 54a, 57a n.21, 59a-60a, 77a, 80a n.42).

With respect to each such alternative, moreover, the District Court painstakingly distinguished the individual stations' circumstances from those of CBS. Thus, WIVB-TV in Buffalo was found to be utterly dissimilar from CBS in its ability to escape the effects of the blanket license—

6. Respondents' own witnesses provided much of petitioners' evidence. For example, ASCAP's president and its former general counsel admitted that the "direct licensing" alternative—*i.e.*, each individual station fulfilling its music licensing requirements by seeking out, and negotiating license terms with, thousands of composers and music publishers—was "impossibly difficult." (Trial Transcript, Dec. 11 & 15, 1981 at 1830-31, 2070-71). Similarly compelling testimony was adduced with respect to the non-availability of the so-called per program license offered by ASCAP and BMI and of producer source licensing. (Pet. App. 68a-70a).

not based on the trial court's mere intuition (BMI Opp. 5), but on overwhelming record evidence. This finding is hardly surprising: the individual local stations are relatively small, disparate consumers of music acting in hundreds of separate markets. CBS, in contrast, is a major program producer controlling access to more than 200 television markets, and is itself a major music publisher.

Not finding a single one of the District Court's findings to be "clearly erroneous," as it was required to do before overturning those findings, *Inwood Laboratories, Inc.* v. *Ives Laboratories, Inc.*, 456 U.S. 844 (1982), the Court of Appeals nonetheless criticized petitioners for having failed to proffer additional evidence relating to the Court of Appeals' newly hypothesized theory of the market and of the stations' potential ability to pursue alternatives to the blanket license. As an example, although the record evidence was uncontradicted that direct licensing transactions between individual stations and composers were utterly infeasible, the Court of Appeals relied on a lack of evidence "that any local station had ever offered any composer a sum of money in exchange for performing rights." (Pet. App. 24a).

Thus, after substituting its theoretical views for record evidence, the Court of Appeals reversed and dismissed the complaint—without affording the stations any opportunity, on remand, to address the new evidentiary issues viewed by the Court of Appeals to be relevant.

4. In sum, ASCAP's and BMI's efforts to harmonize the Second Circuit's decision in this case with prior precedent, to lump the local stations together with CBS, and to portray this as a mere failure of proof case, do not succeed in diminishing the importance of the issues presented for review by this Court. There is, in the Court of Appeals' decision, an undeniable conflict with past decisions of this Court and of other Circuits which recognize the need for an evaluation of all substantial pro- and anti-competitive effects in rule of reason cases. The decision drains the rule of reason of economic substance. It selects one element of the total economic context of the restraint—the theoretical availability of alternatives—and, finding such theoretical alternatives, elevates that one element to a status which

forecloses consideration of all of the other pro- and anti-competitive consequences. Such a reading of the Sherman Act is without precedent—because it is simply wrong.

The Second Circuit's decision comes at a time when this Court and the Justice Department are increasingly relying upon the rule of reason as the principal tool of antitrust enforcement. A clear formulation of the rule's elements and economic rationale are particularly important at this time. The Second Circuit's formalistic reliance on theoretical alternatives to the exclusion of all other pro- and anti-competitive consequences is certain to be invoked by litigants in private and government enforcement proceedings, and will erect a barrier to effective antitrust enforcement. Review by this Court is needed to dispel the confusion created by the decision below.

The Second Circuit's decision also conflicts with this Court's decision in *CBS*. The Second Circuit's legal standard effectively eliminates antitrust scrutiny in a "large and active line of commerce," contrary to this Court's direction that anti-competitive practices in that line of commerce must be closely scrutinized. In these circumstances, review by this Court is fully warranted.[7]

Conclusion

It is therefore respectfully requested that the petition for a writ of certiorari be granted.

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7. In view of the participation by the United States in prior cases arising in this context, and in view of its continuing supervisory responsibilities (*CBS, supra*, 441 U.S. at 13), the Court may wish to request the Solicitor General to express the views of the United States.

Respectfully submitted,

IRA M. MILLSTEIN
767 Fifth Avenue
New York, New York 10153
(212) 310-8000
Counsel of Record

Of Counsel:
JAMES W. QUINN
R. BRUCE RICH
KENNETH L. STEINTHAL
LOIS PEEL EISENSTEIN
MARTIN J. SILVERMAN
WEIL, GOTSHAL & MANGES